
STATUTORY INTERPRETATION ISN'T THAT TAXING: A LOOK AT THE CURRENT APPLICATION OF THE FEDERAL EXCISE TAX ON COMMUNICATIONS

Kendra Kosko

Supreme Court Justice William O. Douglas once said, “Tax statutes and tax regulations never have been static. Experience, changing needs, and changing philosophies inevitably produce constant change in each.”¹ This sentiment is especially true with regard to regulations governing technology. Technological change occurs at a quicker pace than legislation can be written and congressional consensus can be achieved. Must the language of the law be amended to reflect change or should the static language of the law be interpreted to reflect changing technologies?

Congress established the current statutory framework for taxing communications services in 1965.² At that time, a different landscape existed: one where AT&T held a monopoly on long-distance telephone service³ and the distance and length of a call determined long-distance charges.⁴ Today, there are unprecedented levels of competition.⁵ There is an exponential growth of cellular

¹ *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 97 (1939).

² Excise Tax Reduction Act, Pub. L. No. 89-44, § 302, 79 Stat. 136, 145-48 (1965) (codified as amended at 26 U.S.C. §§ 4251-4254 (2000)) (establishing scheme providing for local and long-distance communications services to be taxed at a declining percentage rate).

³ See generally CHARLES H. KENNEDY, AN INTRODUCTION TO U.S. TELECOMMUNICATIONS LAW, xviii-xxi (2d ed. 2001) (discussing the “Age of Monopoly” in telephone service); see also Declaration of Alan Pearce at 4-5, *XO Commc’ns v. United States*, No. 03-2754 (Fed. Cl. filed Dec. 1, 2003) [hereinafter *Pearce Declaration*] (“For approximately the first 100 years of telephony, long-distance transmission facilities and services were controlled and provided by AT&T.”).

⁴ *Pearce Declaration*, *supra* note 3, at 7 (“In the mid-1960’s, all MTS [Message Telephone Service, otherwise known as long-distance] rates were charged according to duration of call, time of day, day of week, and distance.”).

⁵ See Drew Clark, *The History: 1996 Telecom Rewrite Kept Focus on Phones*, NAT’L JOURNAL’S CONGRESS DAILY (2005),

phones,⁶ introduction of new technologies that permit long-distance calls to be made without using the established telephone network,⁷ and new billing systems that essentially disregard the distance component of long-distance calls and focus largely on duration.⁸ While a 3% tax on long-distance seems relatively minor to an individual taxpayer,⁹ it generates a substantial and steady stream of revenue for the federal government.¹⁰

Section 4251 of the Internal Revenue Code imposes a tax on "communications services,"¹¹ which include "(A) local telephone service; (B) toll telephone service; and (C) teletypewriter exchange service."¹² Currently at issue in vari-

<http://www.njtelecomupdate.com/lenya/telco/live/background/tb-EKJZ1112813148323.html>; WIRELINE COMPETITION BUREAU, FCC, STATISTICS OF COMMUNICATIONS COMMON CARRIERS iv (2004), http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/SOCC/03socc.pdf ("Over 900 firms buy access from local telephone companies in order to provide long-distance service . . .").

⁶ See generally CELLULAR TELECOMM. & INTERNET ASS'N, ANNUALIZED WIRELESS INDUSTRY SURVEY RESULTS DEC. 1985-DEC. 2004, <http://files.ctia.org/pdf/CTIAMidYear2005Survey.pdf> (estimating that the number of cellular service subscribers in 1985 was 340,213 growing to 86,047,003 in 1999 and today, an astonishing 109,478,031 people are cellular customers). This substantial increase in cellular customers was in large part the reason traditional phone companies changed their billing practices. See Proof Brief for the Appellant at 5-6, *Office Max, Inc. v. United States*, 309 F. Supp. 2d 984, *appeal docketed*, No. 04-4009 (6th Cir. Aug. 10, 2004) [hereinafter Office Max Appellant Brief]. The new billing structure for traditional long-distance reflects a similar billing practice to that of the wireless companies. *Id.*

⁷ Jason L. Riley, *A Cheap-Talkin' Bureaucrat*, WALL ST. J., July 21, 2004, at A11 ("VoIP turns a phone call into a cluster of data no different from an instant message or a digital image. And because it's based on software instead of the circuit-switched network hardware now in use, net telephony is cheaper.").

⁸ AT&T was the first to switch to this new type of billing structure; MCI and the others quickly followed AT&T's lead. See Pearce Declaration, *supra* note 3, at 13 (noting that AT&T stopped using the mileage band system in 1997 and MCI changed their billing practice in 2000). The change in billing practices altered the toll rate variations between only three "mileage" bands—intrastate, interstate, or international—as opposed to the thirty mileage bands that were in existence in 1965 when the current statutory language was drafted. See Office Max Appellant Brief, *supra* note 6, at 13; Pearce Declaration, *supra* note 3, at 6.

⁹ Using an average of the best rate plans for the District of Columbia, specifically the Brookland neighborhood, the location of the Catholic University of America, the excise tax on monthly service for an individual family who uses 240 minutes of long-distance would be \$0.42. This computation is based on an average monthly fee of \$2.02 and the average state-to-state price per minute of \$0.05. See Lower My Bills, <http://lowermybills.phonedog.com/ld/default.aspx> (last visited Oct. 14, 2005).

¹⁰ Proof Brief for Plaintiff-Appellee at 31, *Office Max, Inc. v. United States*, 309 F. Supp. 2d 984 (explaining that "in 2000 only \$1.6 billion (27%) of the \$6 billion raised through the tax came from the toll service component"), *appeal docketed*, No. 04-4009, (6th Cir. Aug. 10, 2004) [hereinafter Office Max Appellee Brief]; Office Max Appellant Brief, *supra* note 6, at 23.

¹¹ I.R.C. § 4251(a) (2000).

¹² *Id.* § 4251(b)(1).

ous courts is the treatment of toll telephone service, widely known to the public as long-distance service. The Internal Revenue Code defines toll telephone service as:

(1) a telephonic quality communication for which (A) there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication and (B) the charge is paid within the United States, and

(2) a service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.¹³

Although initially imposed in 1898 to finance the Spanish–American War,¹⁴ the federal telephone excise tax was adopted in its current form in 1965.¹⁵ The language was drafted during a period when charges for long-distance calls were based on the elapsed time and distance of each call.¹⁶ Since the 1990s, telephone companies have developed a simplified billing structure whereby charges for long-distance calls are based on per-minute fees, regardless of the call's distance.¹⁷ There has been significant controversy in the courts, because § 4252(b)(1)(A) of the Internal Revenue Code explicitly states that a tax will be imposed on telephone charges that “var[y] in amount with the distance *and* elapsed transmission time of each individual communication.”¹⁸

Eight district court cases¹⁹ have recently questioned the propriety of the conduct of the Internal Revenue Service (“IRS”) in continuing to collect a tax based on a statute apparently at odds with the current long-distance billing

¹³ *Id.* § 4252(b).

¹⁴ STEPHEN J. ENTIN, THE TAX FOUND., TAXING TALK: THE TELEPHONE EXCISE TAX AND THE UNIVERSAL SERVICE FEES 1 (Mar. 2000), available at <http://www.taxfoundation.org/publications/show/123.html>.

¹⁵ Excise Tax Reduction Act, Pub. L. No. 89-44, § 302, 79 Stat. 136, 145–48 (1965) (codified as amended at 26 U.S.C. §§ 4251–4254 (2000)).

¹⁶ Francisca N. Mordi, Todd B. Reinstein & Laura C. Mow, *Changes in Technology May Make the Telecommunications Services Excise Tax Obsolete* 2 (Sept. 2004), http://www.bnatax.com/tm/insights_Telecom.htm.

¹⁷ Thomas D. Sykes, *The Growing Controversy Over Federal Excise Tax on Long-Distance Calls* 215 (May–June 2003), <http://www.mwe.com/info/pubs/tomsykes.pdf>.

¹⁸ I.R.C. § 4252(b)(1)(A) (emphasis added).

¹⁹ See *Am. Bankers Ins. Group v. United States*, 308 F. Supp. 2d 1360 (S.D. Fla. 2004), *rev'd*, 408 F.3d 1328 (11th Cir. 2005); *Office Max, Inc. v. United States*, 309 F. Supp. 2d 984 (N.D. Ohio 2004), *appeal docketed*, No. 04-4009 (6th Cir. Aug. 10, 2004); *Fortis, Inc. v. United States*, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686 (S.D.N.Y. Sept. 16, 2004); *Nat'l R.R. Passenger Corp. v. United States*, 338 F. Supp. 2d 22 (D.D.C. 2004); *Reese Bros., Inc. v. United States*, No. 03-CV-745, 2004 WL 2901579 (W.D. Pa. Nov. 30, 2004); *Honeywell v. United States*, 64 Fed. Cl. 188 (2005); *Am. Online, Inc. v. United States*, 64 Fed. Cl. 571 (2005); *Hewlett-Packard v. United States*, No. C-04-03832, 2005 WL 1865419 (N.D. Cal. Aug. 5, 2005). There are many other cases currently pending in various courts.

methods.²⁰ In each of these cases, the taxpayers sought to recover federal excise taxes they previously paid.²¹ At the trial level, the district courts found for the plaintiffs in seven of the eight cases;²² the Eleventh Circuit subsequently overturned the one case in which the government prevailed—*American Bankers Insurance Group v. United States*.²³

This Comment will discuss why the now overturned district court decision in *American Bankers Insurance Group*²⁴ was correct in its application of the federal excise tax on communications. In addition to the government's approach in the line of cases relating to the telephone excise tax, this Comment will suggest a slightly different approach in favor of applying the tax.²⁵ Section I of this Comment will begin by outlining the history of the federal excise telephone tax. This discussion will be augmented with an outline of the history of long-distance telephone services in the United States. Next, this Comment will briefly touch on the economic realities of the excise tax. This Comment will also explain how the district courts interpreted the federal telephone excise tax and then analyze the major themes arising from these cases. Section I will conclude with a discussion of the impact of the Eleventh Circuit's ruling.²⁶ Section II will discuss the canons of statutory construction with emphasis on the hierarchy of relevant tax sources. Next, this Comment will attempt to unify the

²⁰ Andrew Odlyzko, *Pricing and Architecture of the Internet: Historical Perspectives from Telecommunications and Transportation* 24 (Aug. 2004), <http://www.dtc.umn.edu/~odlyzko/doc/pricing.architecture.pdf> ("Today . . . we are seeing the spread of flat rates to long-distance telephony" as opposed to metered billing).

²¹ *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1362 (seeking a refund of \$361,763.24); *Office Max, Inc.*, 309 F. Supp. 2d at 987 (seeking a refund of \$383,990.38); *Fortis, Inc.*, 2004 U.S. Dist. LEXIS 18686, at *2 (seeking a refund of \$439,384.84); *Nat'l R.R. Passenger Corp.*, 338 F. Supp. 2d at 24 (seeking a refund of \$86,103.28); *Reese Bros., Inc.*, 2004 WL 2901579, at *1 (seeking a refund of \$345,351.53); *Honeywell Int'l, Inc.*, 64 Fed. Cl. at 191 (seeking a refund of \$2,357,637.56); *Am. Online, Inc.*, 64 Fed. Cl. at 573 (seeking a refund of \$201,141); *Hewlett-Packard*, 2005 WL 1865419, at *1 (seeking a refund of \$6,385,671.86).

²² Only one court held in favor for the government. *Am. Bankers Ins. Group*, 308 F. Supp. 2d 1360 (holding that the purpose of the statute shall control since the language of I.R.C. § 4252(b)(1) is ambiguous).

²³ *Am. Bankers Ins. Group*, 408 F.3d 1328 (11th Cir. 2005).

²⁴ 308 F. Supp. 2d 1360 (S.D. Fla. 2004), *rev'd*, 408 F.3d 1328 (11th Cir. 2005).

²⁵ The government asserts a three-prong position arguing primarily that the current long-distance services do fall within the statutory definition of toll telephone service. *See generally* cases cited *supra* note 19. Failing that, the IRS states that the telephone services at issue fall within the statutory definition of Wide Area Telecommunications Service (WATS) and, as a last resort, that the telephone services fall within the definition of local telephone service. *Id.* This Comment will focus primarily on the first argument—that the statute applies to the current billing structures. Moreover, this Comment will offer a supplemental—not alternative—argument, maintaining that the WATS provision covers more services than previously noted. This Comment will not delve into the argument that long-distance falls within the statutory definition of local telephone service.

²⁶ *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005).

statutory language, the congressional purpose behind the federal excise tax, and the guiding principles of taxation.²⁷ Section II will also explore alternate theories developed in the various cases and pursue one theory of its own. This Comment will then discuss the materiality and impact of this tax. Section III will assess what the future holds for the federal excise tax. This Comment will conclude by suggesting that the majority of courts have viewed the issue from the wrong perspective and, thus, have incorrectly rejected the application of the telephone excise tax to current long-distance plans.²⁸

I. THE STATE OF THE LAW

A. History of the Federal Telephone Excise Tax and the Evolution of Long-Distance Service

Congress enacted the telephone excise tax in 1898 as a means of financing the Spanish–American War.²⁹ It was intended to be a temporary measure and Congress eliminated the tax in 1902 at the end of the war.³⁰ Nevertheless, the history of the tax is tumultuous.³¹ Collection of the tax is performed with relative administrative ease and produces substantial revenue for the government;³²

²⁷ Good tax policy is based on certain fundamental principles. Three main principles are: (1) equity or fairness; (2) simplicity; and (3) neutrality. *See* INST. ON TAXATION & ECON. POLICY, TAX PRINCIPLES: BUILDING BLOCKS OF A SOUND TAX SYSTEM, May 25, 2004, <http://www.itepnet.org/pb9princ.pdf>.

²⁸ This Comment supports the outcome of the *American Bankers Insurance Group* case. Nevertheless, the argument should primarily focus on the purpose of the statute as well as the re-enactment doctrine. The author of this Comment would pay less attention to the “and is or” argument, and demote that to a sideline rationale. However, these are simply slightly different means to achieve the same end. *See Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1360.

²⁹ The tax in its initial form was a “one-penny tax.” Beatrice E. Garcia, *Tax Battles*, MIAMI HERALD, Sept. 30, 2004; *see* Spanish–American War Revenue Act, Pub. L. No. 55-133, 30 Stat. 460 (1898); *see also* ENTIN, *supra* note 14, at 1; Kay Bell, *Presidential Veto Puts Repeal of Telephone Tax on Hold*, BANKRATE.COM, Nov. 3, 2000, http://www.bankrate.com/brm/itax/tax_watch/20001103a.asp (noting the tax had its start in 1898 “as a penny addition to long-distance calls of 15 cents or more”).

³⁰ LOUIS ALAN TALLEY, CONG. RESEARCH SERV., THE FEDERAL EXCISE TAX ON TELEPHONE SERVICE: A HISTORY 1 (2001) [hereinafter TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE], http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL30553_01042001.pdf.

³¹ The tax was repealed twice in 1902 and 1924. *See generally id.* It was allowed to expire once in 1916, and it has been extended twenty-nine times since 1932. *Id.* The tax was not made permanent until the Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, § 11217(a), 104 Stat. 1388–437.

³² LOUIS ALAN TALLEY, CONG. RESEARCH SERV., TELEPHONE EXCISE TAX 1 (2000) [hereinafter TALLEY: TELEPHONE EXCISE TAX], <http://budget.senate.gov/democratic/crsbackground/teltax.pdf>.

it has been used to support all major wars,³³ including World War I,³⁴ World War II,³⁵ and the Vietnam War.³⁶ In addition, the government has utilized the tax when responding to periods of economic downturns³⁷ and substantial budget deficits.³⁸ Although the tax has been in and out of the of the government's favor, it has continuously been in effect since 1932.³⁹ In 1944, the telephone excise tax levy was a hefty 25% and was reduced to 10% over the next

³³ ENTIN, *supra* note 14, at 1 ("Every war [the United States] fought during the 20th century was used to raise or extend the tax."). Since the revenues from the excise tax financed every war fought in the twentieth century, some have named it the "war tax." See, e.g., National War Tax Resistance Coordinating Committee, <http://nwtccc.org/phonetax.htm> (last visited Oct. 9, 2005). There is an underground movement to protest war by not paying the excise tax listed on telephone bills. See, e.g., Hang Up on War!, <http://www.hanguponwar.org> (last visited Feb. 8, 2005); see also The Nonviolent Action Community of Cascadia, Telephone War Tax Resistance, <http://riseup.net/nacc/telephone.htm> (last visited Feb. 8, 2005) (instructing visitors how to refuse paying the tax as well as possible consequences for not paying it). Although the common misperception is that revenues raised from the federal communications excise tax support defense spending, the reality is that the revenues go into a general U.S. Treasury fund. See TALLEY: TELEPHONE EXCISE TAX, *supra* note 32, at 1; see also TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 1.

³⁴ War Revenue Act of October 3, 1917, Pub. L. No. 65-50, 40 Stat. 300; see TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 3.

³⁵ Revenue Act of 1941, Pub. L. No. 77-250, 55 Stat. 714 (making excise taxes permanent).

³⁶ Tax Adjustment Act of 1966, Pub. L. No. 89-368, 80 Stat. 66; Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, 82 Stat. 265; Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 660; Excise, Estate and Gift Tax Adjustment Act of 1970, Pub. L. No. 91-614, 84 Stat. 1843. U.S. Representative Wilbur D. Mills expressed the view of Congress that these were temporary extensions and "Vietnam and only the Vietnam operation ma[de] the bill necessary." TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 5.

³⁷ TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 2 ("On September 4, 1914, President Wilson[, responding to a drop in imports,] called upon Congress to raise an additional \$100 million through 'internal' taxes (in contrast to customs duties) . . . In response, Congress passed H.R. 18891 commonly known as the Emergency Internal Revenue Tax Act of 1914. The Act was mostly a renewal of the excises contained in the Spanish-American War Revenue Act."); see Emergency Internal Revenue Tax Act of 1914, Pub. L. No. 63-217, 38 Stat. 761. The federal excise tax was also used as a means of combating the Great Depression. TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 3; see Revenue Bill of 1932, Pub. L. No. 154.

³⁸ Revenue Reconciliation Act of 1990, Pub. L. No. 101-508 § 11217(a), 104 Stat. 1388-437 (codified at I.R.C. § 4251(b)(2)). Due to "large continuing budget deficits, Congress concurred with [President Bush's] recommendation and made the tax a permanent part of our tax revenue structure" at a rate of 3%. TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 6; see also TALLEY: TELEPHONE EXCISE TAX, *supra* note 32, at 3.

³⁹ *Fortis, Inc. v. United States*, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686, at *8 (S.D.N.Y. Sept. 16, 2004); see TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 3 ("Today's current telephone tax, derives from the *Revenue Bill of 1932*. Since then, it has been reauthorized 29 times.").

twenty years.⁴⁰ The Revenue Reconciliation Act of 1990⁴¹ gave permanency to the excise tax and reduced it to its current rate of 3%.⁴²

The tax was initially deemed a luxury tax⁴³ since the telephone was not originally widely used⁴⁴ and was an expensive service.⁴⁵ At the time, a significant portion of the cost⁴⁶ resulted from the requirement of operators to complete connections.⁴⁷ As telephones became more common,⁴⁸ the tax evolved into what some might consider a user fee.⁴⁹

The basic premise of the telephone excise tax is to permit the federal government “to raise revenue by collecting a tax on almost all commercial telephone usage.”⁵⁰ The definition of taxable toll telephone service has not

⁴⁰ SUMEET SAGOO, TAX FOUND., FACTS AND FIGURES ON GOVERNMENT FINANCE 128 (38th ed. 2004), available at <http://taxfoundation.org/publications/show/147.html>.

⁴¹ Revenue Reconciliation Act, § 11217(a).

⁴² ENTIN, *supra* note 14, at 1; see SAGOO, *supra* note 40.

⁴³ ADVISORY COMM’N ON ELEC. COMMERCE, REPORT TO CONGRESS 26 (2000), http://www.ecommercecommission.org/accec_report.pdf; see also IRS.gov, http://www.irs.gov/app/understandingTaxes/jsp/s_tools_glossary.jsp (last visited Sept. 8, 2005) (defining luxury tax as “[a] tax paid on expensive goods and services considered by the government to be nonessential”).

⁴⁴ At the time the first telephone excise tax was enacted in 1898, there were 495,798 telephones in the United States. See ROBERT W. GARNET, THE TELEPHONE ENTERPRISE: THE EVOLUTION OF THE BELL SYSTEM’S HORIZONTAL STRUCTURE, 1876–1909, at 160–61 (1985).

⁴⁵ ADVISORY COMM’N ON ELEC. COMMERCE, *supra* note 43, at 26 (“Before the widespread use of the telephone following World War II, the tax was considered a ‘luxury’ tax.”).

⁴⁶ For an idea of how expensive phone service was at the time, see, for example, AT&T, Milestones in AT&T History, <http://www.att.com/history/milestones.html> (last visited Sept. 8, 2005) (noting that the first long-distance call between New York and Chicago in 1892 was \$9 for the first five minutes).

⁴⁷ Odlyzko, *supra* note 20, at 23–24.

⁴⁸ ENTIN, *supra* note 14, at 5 (“Telephones may indeed have been a luxury for several decades . . . but falling costs and rising incomes eventually made them common appliances in most homes.”); see AT&T, A Brief History: Origins, <http://www.att.com/history/history1.html> (last visited Sept. 16, 2005) (“Between 1894 and 1904 . . . the number of telephones boomed from 285,000 to 3,317,000.”); see also TelephonyMuseum.com, Telephone History 1940–Today, <http://www.telephonymuseum.com/History%201940-today.htm> (“There were 30,000,000 phones in service in 1948[,] . . . [and b]y 1971 there were over 100 million phones in service”).

⁴⁹ See IRS.gov, http://www.irs.gov/app/understandingTaxes/jsp/s_tools_glossary.jsp (last visited Oct. 8, 2005) (defining a user fee as “[a]n excise tax, often in the form of a license or supplemental charge, levied to fund a public service”). But see ENTIN, *supra* note 14, at 4 (“The telephone excise tax is not a user fee. It does nothing to promote phone service. All of it goes into general revenue. It is a pure money raiser.”).

⁵⁰ Am. Bankers Ins. Group v. United States, 308 F. Supp. 2d 1360, 1367 (S.D. Fla. 2004), *rev’d*, 408 F.3d 1328 (11th Cir. 2005). Almost all long-distance was intended to be covered by the tax, except for the explicitly mentioned exemptions in § 4253. See I.R.C. § 4253 (2000); see also *infra* note 100 and accompanying text.

changed since 1965.⁵¹ The current definition is narrower than the earlier, very broad definition.⁵² It was narrowed in 1965 in order to reflect the then current manner of customer billing for toll telephone services.⁵³ In 1965, AT&T⁵⁴ charges for long-distance were either (a) based on the elapsed time of each call multiplied by a charge per minute; or (b) based on “a periodic charge that equaled a flat rate or was calculated on total elapsed transmission time.”⁵⁵

This definition did not pose any problems until the mid-1990s. During this time, telephone companies altered their billing methods⁵⁶ moving to a system of long-distance call charges “according to uniform toll rates . . . not dependent on the mileage bands . . . [and] not otherwise designated as varying according to distance.”⁵⁷ These new rates considered “postalized” rates⁵⁸ were introduced for two primary reasons: (1) distance factored less into long-distance costs;⁵⁹ and (2) the end of the Bell System monopoly resulted in increased competi-

⁵¹ I.R.C. § 4252(b).

⁵² Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, § 133, 72 Stat. 1275, 1290 (current version at I.R.C. § 4252(b)) (defining taxable toll telephone service very broadly as “a telephone or radio telephone message or conversation for which (1) there is a toll charge, and (2) the charge is paid within the United States”).

⁵³ Excise Tax Reduction Act, Pub. L. No. 89-44, § 302, 79 Stat. 136, 145-48 (1965) (codified as amended at I.R.C. §§ 4251-4254); *see* Fortis, Inc. v. United States, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686, at *27 (S.D.N.Y. Sept. 16, 2004) (“Because AT&T had a virtual monopoly over long-distance service, the statute did effectively tax virtually all long-distance service available at the time”); *see also* Am. Bankers Ins. Group v. United States, 408 F.3d 1328 (11th Cir. 2005) (citing *Trans-Lux Corp. v. United States*, 696 F.2d 963, 967 (Fed. Cir. 1982)) (“In 1965, it appears Congress amended the definition to its current language in an effort to modify and update it ‘in order to reflect and to meet the changing technology and market conditions of the industry.’”).

⁵⁴ *Office Max, Inc. v. United States*, 309 F. Supp. 2d 984, 990 (N.D. Ohio 2004) (stating that AT&T “was the predominant communications carrier” in 1965), *appeal docketed*, No. 04-4009 (6th Cir. Aug. 10, 2004).

⁵⁵ *Id.* at 990 (citing Pearce Declaration); *see* Pearce Declaration, *supra* note 3, at 6 (“[A call would cost] more based on the number of mileage bands crossed. In 1965, there were more than 30 mileage bands developed by AT&T”).

⁵⁶ *See* Sykes, *supra* note 17, at 215; Mordi, *supra* note 16.

⁵⁷ *Am. Bankers Ins. Group v. United States*, 308 F. Supp. 2d 1360, 1367 (S.D. Fla. 2004), *rev’d*, 408 F.3d 1328 (11th Cir. 2005). “The 30+ mileage bands went from 1-8 miles to one that was from 2,301 to 3,000 miles.” Pearce Declaration, *supra* note 3, at 6 (stating that the more than thirty mileage bands in 1965 were eventually reduced to eleven).

⁵⁸ LEVINE, BLASZAK, BLOCK & BOOTHBY, LLP, FEDERAL EXCISE TAX REFUNDS COULD BE PAID IN FULL, Oct. 6, 2003, <http://www.lb3law.com/docs/VoiceReport100603.cfm>. *See generally* Odlyzko, *supra* note 20, at 23-24 (“[P]ostal services started out with distance-sensitive tariffs. Later, after switching to what are now known as ‘postal rates,’ independent of distance, they still were introducing services motivated by the incentives to price discriminate, such as postcards.”).

⁵⁹ Pearce Declaration, *supra* note 3, at 6 (“As distance became less important as a cost factor, due initially to technological developments and later to competitive trends, the mileage bands were reduced and/or eliminated.”).

tion.⁶⁰ Have the communications providers outpaced Congress and avoided the telephone excise tax simply by phasing distance out of current toll telephone charges?

Although this change in billing may have escaped the attention of Congress, taxpayers certainly did not overlook it.⁶¹ Prior to 2003, one law firm, Levine, Blaszak, Block & Boothby, LLP (“LB3”), filed refund claims with the IRS for its corporate⁶² clients.⁶³ The LB3 lawyers noted that the standard IRS response was to simply deny the claim.⁶⁴ Persistence was key at this point. LB3 asserts that, upon requesting review of the claim denial, the IRS would then attempt to settle the dispute by paying “30–40 cents on the dollar” of the requested refund.⁶⁵ After attempting to negotiate a better settlement for their clients,⁶⁶ LB3 eventually filed suit.⁶⁷

B. The Economics of the Excise Tax

In 2003, the federal government collected an unprecedented \$6 billion from the federal excise tax on telephone services.⁶⁸ Since 1998, the collected tele-

⁶⁰ *Id.* at 10 (“The break up of the Bell System resulted in massive changes in industry structure, pricing of services, and the level of competition.”); *See United States v. AT&T*, 552 F. Supp. 131, 226–34 (D.D.C. 1982), *cert. denied*, 460 U.S. 1001 (1983), for further information on the dissolution of the Bell monopoly.

⁶¹ Although a 3% tax on long-distance only costs an individual consumer a few dollars a month, small and large businesses alike stand to save a much larger amount.

⁶² Individual consumers are essentially restricted from making refund claims of the federal excise taxes paid within the statute of limitations. The cost would be too much to pursue individually. Furthermore, class-action suits are extremely difficult to organize in tax refund cases because of the rules and regulations relating to making overpayment claims. David Rohde & Stephen Rosen, *Wrangling for a Refund*, NETWORKWORLD, Apr. 12, 2004 at 2, <http://www.nwfusion.com/research/2004/0412telecomtax.html>; *see* I.R.C. § 7422(a) (2000); 26 C.F.R. § 301.6402-2 (2005); *Agron v. Ill. Bell Tel. Co.*, 325 F. Supp. 487, 488 (N.D. Ill. 1970) (holding that failure “to name the claimants and the amounts due to each . . . falls far short of the detail required by federal regulations”).

⁶³ Press Release, Levine, Blaszak, Block & Boothby, LLP, LB3 Scores First Win in Nationwide Effort to Recover Federal Excise Tax Overpayments, <http://www.lb3law.com/docs/FETWriteup.cfm> (last visited Sept. 10, 2005).

⁶⁴ *Id.*

⁶⁵ *Id.*; *see also* Warren Rojas, *Phone Tax Fix Could Put Refund Suits on Hold*, TAX NOTES 414, Jan. 24, 2005, <http://www.lb3law.com/docs/TN0124.pdf> (“[T]he Big Five accounting firms had been pursuing phone tax settlement claims for years.”).

⁶⁶ Levine, Blaszak, Block & Boothby, LLP, *supra* note 63.

⁶⁷ *See generally* Rojas, *supra* note 65, at 413 (noting that LB3 has worked on behalf of six of the sixteen taxpayers seeking refunds and representation for seven of the claims is currently unknown).

⁶⁸ CONG. BUDGET OFFICE, THE BUDGET & ECONOMIC OUTLOOK: FISCAL YEARS 2005–2014, 87 tbl.4-8 (2004), *available at* <http://www.cbo.gov/ftpdocs/49xx/doc4985/01-26-BudgetOutlook-EntireReport.pdf> [hereinafter CONG. BUDGET OFFICE].

phone excise taxes have been near or above \$5 billion annually.⁶⁹ Based on these numbers, the telephone excise tax is the third largest federal excise tax lagging behind only the excise taxes on tobacco and alcohol.⁷⁰ While alcohol and tobacco excise taxes generally are considered sin taxes,⁷¹ the telephone tax is considered to be akin to a user fee.⁷² Although the purpose of a user fee is to raise revenues to fund a specific public service,⁷³ the revenues collected from this particular user fee are deposited into the general revenue fund of the Treasury.⁷⁴ Former Chairman of the Federal Communications Commission (“FCC”) Reed Hundt⁷⁵ stated that it was an excellent source of revenue since telephone usage is so prevalent.⁷⁶

The Congressional Budget Office projects that the federal government will collect \$86 billion from the telephone excise tax over the next nine years.⁷⁷ Thus there is tremendous incentive on the part of the government to maintain the current IRS interpretation⁷⁸ of § 4252 of the Internal Revenue Code.⁷⁹ Additionally, Congress may view the various cases⁸⁰ as an impetus to amend the current tax code and make explicitly clear what its intentions are for taxing

⁶⁹ OFFICE OF MGMT. & BUDGET, THE BUDGET FOR 2006, HISTORICAL TABLES, 41–42 tbl.2.4 (2005), available at <http://www.whitehouse.gov/omb/budget/fy2006/pdf/hist.pdf>.

⁷⁰ ADVISORY COMM’N ON ELEC. COMMERCE, *supra* note 43, at 26.

⁷¹ ENTIN, *supra* note 14, at 5 (justifying sin tax as a supposed “means of reducing externalities—the damage done to innocent third parties by the misuse of the dangerous products on which they are imposed”).

⁷² See *supra* note 49 and accompanying text.

⁷³ *Id.*

⁷⁴ TALLEY: TELEPHONE EXCISE TAX, *supra* note 32, at 2.

⁷⁵ Reed Hundt was an FCC Commissioner from 1993–1997. Federal Communications Commission, Previous FCC Commissioners, <http://www.fcc.gov/commissioners/previouscommish.html> (last visited Sept. 17, 2005).

⁷⁶ ENTIN, *supra* note 14, at 12. Entin called this the “Willie Sutton school of tax policy.” *Id.* Willie Sutton was a notorious bank robber who claimed that the reason he robbed banks was because that was where the money was. See generally Steve Cocheo, *The Bank Robber, The QUOTE, the Final Irony*, http://www.banking.com/aba/profile_0397.htm (last visited Aug. 30, 2005); see also TALLEY: TELEPHONE EXCISE TAX, *supra* note 32, at 3 (asserting that 94% of households had telephone service in 1999).

⁷⁷ CONGR. BUDGET OFFICE, *supra* note 68, at 87 tbl.4-8 (projecting what the annual collection of telephone excise taxes will be, in billions: 2005–\$7, 2006–\$7, 2007–\$8, 2008–\$8, 2009–\$8, 2010–\$9, 2011–\$9, 2012–\$10, 2013–\$10, 2014–\$11).

⁷⁸ The IRS asserts that the intention of the legislature in enacting § 4252 was to tax all long-distance service thereby reading the “and” in the definition of long-distance in the disjunctive sense. The IRS further contends that Revenue Ruling 79-404 permits the collection of the federal excise tax on long-distance services where distance was not a factor in the charge. See *Am. Bankers Ins. Group v. United States*, 308 F. Supp. 2d 1360, 1370–71 (S.D. Fla. 2004), *rev’d*, 408 F.3d 1328 (11th Cir. 2005).

⁷⁹ Rojas, *supra* note 65, at 414 (“[T]he Congressional Budget Office phone tax projections—which estimate that excise tax revenue is roughly \$6 billion—are dependent on sustaining the status quo.”).

⁸⁰ See cases cited *supra* note 19.

long-distance telephone service.⁸¹ However, it is entirely within the realm of possibility that Congress was hoping for resolution from the courts—no member of Congress wants to be responsible for promoting “new” taxes given political ramifications.

C. The Conflict Among the Federal District Courts

To date, eight district courts⁸² and one appellate court⁸³ have ruled on the issue of whether the 3% federal excise tax on long-distance telephone service applies to long-distance billing policies that do not factor distance into the charge of the call.⁸⁴ Seven district courts have held in favor of the taxpayers.⁸⁵

*American Bankers Insurance Group*⁸⁶ was the first to be decided in this line of cases. So far it has been the only case holding in favor of the government, although the Eleventh Circuit subsequently overturned it on appeal.⁸⁷ In determining whether the long-distance services purchased by American Bankers Insurance Group fell within the § 4252⁸⁸ definition of toll telephone service, the court first looked to the statutory construction to determine if the language was ambiguous.⁸⁹ Ultimately, the court found the statute’s use of the word

⁸¹ By amending the current code, the legislature will also have an opportunity to address other emerging communications issues that could potentially fall under the umbrella of the telephone excise tax, such as voice over Internet protocol (“VoIP”). See Rojas, *supra* note 65, at 414 (“The FCC effectively absolved VoIP providers from state regulation in a declaratory ruling issued last November in connection with a dispute between Vonage Holdings Corp. and the Minnesota Public Utilities Commission.”); see discussion *infra* Sections II.D, III.

⁸² See cases cited *supra* note 19.

⁸³ *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005).

⁸⁴ There are several other cases pending in various courts around the country. A sampling of those companies filing suit to claim refunds are as follows (refund amounts are noted in parenthesis, if available): Convergys (\$6,001,070.22); XO Communications, Inc.; Roll International Corp.; PNC Bank, N.A.; JP Morgan Chase & Co.; Wal-Mart; Global Crest Communications; and United Technologies. See Rojas, *supra* note 65, at 413.

⁸⁵ See *Office Max, Inc. v. United States*, 309 F. Supp. 2d 984 (N.D. Ohio 2004), *appeal docketed*, No. 04-4009 (6th Cir. Aug. 10, 2004); *Fortis, Inc. v. United States*, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686 (S.D.N.Y. Sept. 16, 2004); *Nat’l R.R. Passenger Corp. v. United States*, 338 F. Supp. 2d 22 (D.D.C. 2004); *Reese Bros., Inc. v. United States*, No. 03-CV-745, 2004 WL 2901579 (W.D. Pa. Nov. 30, 2004); *Honeywell Int’l, Inc. v. United States*, 64 Fed. Cl. 188 (2005); *Am. Online, Inc. v. United States*, 64 Fed. Cl. 571 (2005); *Hewlett-Packard v. United States*, No. C-04-03832, 2005 WL 1865419 (N.D. Cal. Aug. 5, 2005).

⁸⁶ *Am. Bankers Ins. Group v. United States*, 308 F. Supp. 2d 1360 (S.D. Fla. 2004), *rev’d*, 408 F.3d 1328 (11th Cir. 2005).

⁸⁷ See *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005).

⁸⁸ I.R.C. § 4252(b) (2000).

⁸⁹ *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1363 (“In determining congressional intent, courts should give overriding deference to the unambiguous language of a statute.”).

“and”⁹⁰ to be ambiguous, as it harbors both a conjunctive and a disjunctive meaning.⁹¹ Once statutory language is found to be ambiguous, the court may analyze congressional intent.⁹²

The court would have reached a congressional intent analysis regardless of whether it viewed the language as clear based on the rule of *United States v. American Trucking Ass'ns, Inc.*⁹³ The Supreme Court, in *American Trucking Ass'ns, Inc.*, held that “even when the plain meaning [of the statute] did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this court has followed that purpose, rather than the literal words.”⁹⁴ In *American Bankers Insurance Group*, the court decided that the amendments to § 4252 in 1965⁹⁵ were intended to encompass all commercial long-distance services.⁹⁶ Thus, not applying the tax to current long-distance services would be unreasonable.⁹⁷ When viewing the circumstances surrounding the definitional change in 1965,⁹⁸ the court stated that Congress clearly intended to levy the excise tax on all commercial long-distance available at the time⁹⁹ and exclude only those services explicitly mentioned by statute.¹⁰⁰ Additionally, the Supreme Court has consistently held that

⁹⁰ It is all too often that simple, everyday words pose significant problems to those in the legal field. In 1998, the President of the United States grappled with the meaning of the word, “is”. See *Clinton's Grand Jury Testimony*, TIME, Aug. 17, 1998, <http://www.time.com/time/daily/scandal/testimony/temp4.html> (Aug. 17, 1998) (“It depends upon what the meaning of the word means. If is means is, and never has been, that's one thing. If it means, there is none, that was a completely true statement.”).

⁹¹ *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1365.

⁹² *Id.* at 1366 (“Section 4252(b) is therefore ambiguous, and extrinsic evidence of congressional intent may be considered.”).

⁹³ *United States v. Am. Trucking Ass'ns*, 310 U.S. 534 (1940).

⁹⁴ *Id.* at 544 (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)).

⁹⁵ Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, § 302, 79 Stat. 136, 145-48 (1965) (codified as amended at I.R.C. §§ 4251-4254 (2000)) (narrowing the definition of long-distance from its very broad earlier definition to cover the long-distance offerings by the AT&T monopoly).

⁹⁶ *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1367-68.

⁹⁷ There have been several attempts to repeal the excise tax with the most recent being in 2000. Although the measure passed both houses of Congress, it suffered defeat by a presidential veto. See Bell, *supra* note 29. The rationale for repeal at that time was the large budget surplus created in part from the excise tax collections. However, the economic situation has drastically changed in the past fourteen years and the United States has faced a return of substantial deficits. See *infra* notes 194-95.

⁹⁸ Excise Tax Reduction Act, § 302.

⁹⁹ See Pearce Declaration, *supra* note 3, at 15 (“In summary, in the mid 1960s, AT&T remained the dominant long-distance carrier in the United States.”).

¹⁰⁰ I.R.C. § 4253 (2000); see H.R. REP. NO. 106-631, at 3-4 (2000) (Conf. Rep.) (stating that exemptions include (1) public coin operated service amounting to less than 25 cents; (2) service for the collection of various news by press agencies; (3) private service where there is a separate charge for local telephone service; (4) service to international organizations and American Red Cross; (5) long-distance services for the armed services; (6) telephone ser-

“exemptions from taxation are to be construed narrowly.”¹⁰¹

By reading the statute literally, the court would essentially eliminate the federal excise tax on the majority of long-distance services as most of this service is currently billed without regard to distance.¹⁰² Thus, the congressional intent to raise revenues through a tax on long-distance service would be defeated. The *American Bankers Insurance Group* court correctly viewed this as an unreasonable result.¹⁰³

The IRS also relied on a 1979 revenue ruling to support its position that distance may be overlooked when levying the telephone excise tax.¹⁰⁴ In this revenue ruling, the IRS held that an offshore satellite telephone communications system was subject to the federal excise tax on communication services even though the charges were not altered by distance.¹⁰⁵ The court in *American Bankers Insurance Group* held that although “revenue rulings neither have ‘the force and effect of regulations,’”¹⁰⁶ “nor can they be used to ‘overturn the plain language of a statute,’”¹⁰⁷ Revenue Ruling 79-404¹⁰⁸ was persuasive¹⁰⁹ and “a revenue ruling is entitled to as much weight as its persuasiveness allows.”¹¹⁰

The other seven district court cases in which the taxpayers found relief, as well as the appellate case, followed a similar rationale.¹¹¹ *Office Max, Inc. v. United States* paved the way for the taxpayers’ cause holding that the plain

vice for non-profit hospitals; (7) certain service to common carriers; (8) telephone service to State and local governments; and (9) telephone service provided to not-for-profit educational organizations).

¹⁰¹ *Bingler v. Johnson*, 394 U.S. 745, 752 (1969); *Comm’r v. Jacobsen*, 336 U.S. 28, 49 (1949); *MCI Commc’ns Corp. v. United States*, 26 F. Supp. 2d 6, 9 (1998); *Gummer v. United States*, 40 Fed. Cl. 812, 816 (1998).

¹⁰² *Am. Bankers Ins. Group v. United States*, 308 F. Supp. 2d 1360, 1367 (S.D. Fla. 2004), *rev’d*, 408 F.3d 1328 (11th Cir. 2005).

¹⁰³ *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1368.

¹⁰⁴ *See* Rev. Rul. 79-404, 1979-2 C.B. 382.

¹⁰⁵ *Id.*

¹⁰⁶ *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1371 (quoting *Davis v. United States*, 495 U.S. 472, 484 (1990)).

¹⁰⁷ *Id.* at 1371 (quoting *Comm’r v. Schleier*, 515 U.S. 323, 336 n.8 (1995)).

¹⁰⁸ Rev. Rul. 79-404, 1979-2 C.B. 382 (holding that I.R.C. § 4252(b) will encompass a communications service under the umbrella of toll telephone service where charges vary only by the elapsed time of the call).

¹⁰⁹ *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1372 (“Even allowing for only the lowest level of deference conceded by Plaintiff, Revenue Ruling 79-404 would be entitled to some weight due to its persuasive analysis of legislative intent.”).

¹¹⁰ *Id.* at 1371.

¹¹¹ *See Office Max, Inc. v. United States*, 309 F. Supp. 2d 984 (N.D. Ohio 2004), *appeal docketed*, No. 04-4009 (6th Cir. Aug. 10, 2004); *Fortis, Inc. v. United States*, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686 (S.D.N.Y. Sept. 16, 2004); *Nat’l R.R. Passenger Corp. v. United States*, 338 F. Supp. 2d 22 (D.D.C. 2004); *Reese Bros., Inc. v. United States*, No. 03-CV-745, 2004 WL 2901579 (W.D. Pa. Nov. 30, 2004); *Honeywell v. United States*, 64 Fed. Cl. 188 (2005); *Am. Online, Inc. v. United States*, 64 Fed. Cl. 571 (2005); *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005).

language of the statute is “clear and unambiguous.”¹¹² Such a finding generally eliminates the need to examine the legislative history of the statute.¹¹³ The court in *Fortis, Inc. v. United States*¹¹⁴ noted that even if it were to consider the legislative history and purpose of the statute, “the proper inquiry focuses on the ordinary meaning of the [provision] at the time Congress enacted it.”¹¹⁵ When Congress enacted the Excise Tax Reduction Act of 1965,¹¹⁶ long-distance charges were influenced by both distance and elapsed transmission time.¹¹⁷ Because “the plain language of [the statute] accurately conveys what Congress sought to achieve in 1965,”¹¹⁸ the court felt that it was not in a position to substitute its judgment for that of the legislature.¹¹⁹

Furthermore, these courts felt that the IRS’s interpretation of the statute was too broad and thus fundamentally wrong in Revenue Ruling 79-404.¹²⁰ The IRS employed the same logic in the revenue ruling that it hopes to utilize in the current situation—although the particular communications service at issue did not come precisely within the statutory definition of taxable telephone services, the federal excise tax should apply nonetheless.¹²¹ Through this ruling, the IRS attempted to infuse flexibility into the statute to enable the law to evolve as

¹¹² *Office Max, Inc.*, 309 F. Supp. 2d at 993 (“Congress expressly chose to define ‘toll telephone service’ in terms of variation in both distance and time.”).

¹¹³ *Reese Bros., Inc.*, 2004 WL 2901579, at *3 (“If the statutory language is clear and unambiguous, no further inquiry is necessary. Where an ambiguity exists, however, the Court may look beyond the statute to the legislative history to determine congressional intent.”).

¹¹⁴ *Fortis, Inc.*, 2004 U.S. Dist. LEXIS 18686.

¹¹⁵ *Id.* at *30 (quoting *Bedroc, Ltd. v. United States*, 541 U.S. 176, 184 (2004)).

¹¹⁶ Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, § 302, 79 Stat. 136, 145–48 (codified as amended at I.R.C. §§ 4251–4254 (2000)).

¹¹⁷ *Nat’l R.R. Passenger Corp. v. United States*, 338 F. Supp. 2d 22, 27 (D.D.C. 2004) (“Both time *and* distance determined the charge for individual long-distance telephone calls in 1965, and Congress’ definition under § 4252(b)(1) mirrored that fact.”).

¹¹⁸ *Id.*

¹¹⁹ *Reese Bros., Inc. v. United States*, No. 03-CV-745, 2004 WL 2901579, at *7 (W.D. Pa. Nov. 30, 2004) (“Updating the statute is not the Court’s role, particularly when doing so would require reading the term ‘distance’ out of the statute. As the Supreme Court has instructed, ‘[t]here is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted.’” (quoting *Lamie v. United States*, 540 U.S. 526, 534 (2004))).

¹²⁰ Rev. Rul. 79-404, 1979-2 C.B. 382; see *Reese Bros., Inc.*, 2004 WL 2901579, at *10 (holding that “in [their] view the IRS’s interpretation is plainly inconsistent with the plain language of the statute—a point which the IRS concedes”).

¹²¹ Rev. Rul. 79-404, 1979-2 C.B. 382 (“It is not toll telephone service because the charge for such service does not vary with distance and therefore does not meet the requirement of section 4252(b)(1), . . . [but t]he intent of the statute would be frustrated if a new type of service otherwise within such intent were held to be nontaxable merely because charges for it are determined in a manner which is not within the literal meaning of the statute.”).

technology advanced.¹²² However, in *National Railroad Passenger Corp.*, the Court declared “only Congress, and not the IRS . . . , may update the statutory text.”¹²³ The *Reese Brothers, Inc.* court revealed a general hesitation in “reading the term ‘distance’ out of the statute[, as u]pdating the statute is not the Court’s role.”¹²⁴ The *Honeywell International, Inc.* court went one step further and acknowledged that Congress may have been “short-sighted.” The court further stated that it is not a function of the judiciary “to rescue Congress from its drafting errors and to provide for what [the courts] think . . . is the preferred result.”¹²⁵

II. ARGUMENTS

A. Canons of Statutory Construction at the District Court Level

Eight district courts have decided the issue of whether current commercial long-distance plans fall within the statutory definition of § 4252.¹²⁶ Seven courts held that the language of the statute was not ambiguous; therefore, the service did not fall within the statutory definition of long-distance and the plaintiffs were owed refunds from the government.¹²⁷ Only one court did not view the statute in such a superficial manner.¹²⁸ If the language of the statute is so patently unambiguous, how is it possible that even one court could miss the clarity? Was the district court in *American Bankers Insurance Group* wrong? This Comment asserts that a deeper examination of the issues demonstrates why the *American Bankers Insurance Group* district court is the only one to have rendered a correct verdict.

The first step in ascertaining the meaning of a statute is examining the plain meaning of the words which the legislature chose.¹²⁹ In resolving the plain

¹²² *Id.* (asserting that the “intent of the statute would be frustrated if a new type of service otherwise within such intent were held to be nontaxable merely because charges for it are determined in a manner which is not within the literal meaning of the statute”).

¹²³ *Nat’l R.R. Passenger Corp. v. United States*, 338 F. Supp. 2d 22, 23 (D.D.C. 2004).

¹²⁴ *Reese Bros., Inc.*, 2004 WL 2901579, at *7 (quoting *Lamie v. United States*, 540 U.S. 526, 534 (2004)).

¹²⁵ *Honeywell Int’l, Inc. v. United States*, 64 Fed. Cl. 188, 199 (2005) (quoting *Lamie v. United States*, 540 U.S. 526, 542 (2004) (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring))).

¹²⁶ I.R.C. § 4252(b)(1) (2000).

¹²⁷ See cases cited *supra* note 19.

¹²⁸ *Am. Bankers Ins. Group v. United States*, 308 F. Supp. 2d 1360 (S.D. Fla. 2004), *rev’d*, 408 F.3d 1328 (11th Cir. 2005).

¹²⁹ See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979) (“As is true in every case involving the construction of a statute, our starting point must be the language employed by Congress.”).

meaning of a word, the court looks to the “‘ordinary, contemporary, common meaning,’ absent an indication Congress intended them to bear some different import.”¹³⁰ If a court finds the language of a statute clear and unambiguous, it is at that point, the court’s inquiry should cease.¹³¹ Nevertheless, this general rule indicates that there are instances when it is not only acceptable to delve further to determine the meaning of a statute, it is also necessary. The federal excise tax on communications is one such statute that requires a deeper examination of its language and legislative history in order to determine congressional intent.

As asserted by the government, the one word that truly poses any question in the definition of toll telephone service is the word “and”.¹³² “And” has several different meanings and is most commonly defined as “along with or together with;” however, “and” may also be used in “reference to either or both of two alternatives.”¹³³ When a word possesses multiple meanings, the court is required to take into consideration the context in which it is used.¹³⁴ Examining the context mandates an investigation into both “the specific context in which that language is used, and the broader context of the statute as a whole.”¹³⁵ Since “and” possesses both a conjunctive and disjunctive meaning, the courts were required to determine which meaning was employed for this particular section of the Internal Revenue Code.¹³⁶

In those cases holding for the taxpayers, the courts held that “and” was used only in the conjunctive sense given that companies billed long-distance by both distance and time when the statute was drafted in 1965.¹³⁷ These courts relied

¹³⁰ *Honeywell Int’l, Inc.*, 64 Fed. Cl. at 198 (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (quoting *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997))).

¹³¹ *Fortis, Inc. v. United States*, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686, at *17 (S.D.N.Y. Sept. 16, 2004) (“If the statutory terms are unambiguous, the inquiry generally ends there, and the statute is construed according to its plain meaning.”).

¹³² “And” is the critical word in this evaluation due to the phrase, “a toll charge which varies in amount with the distance and elapsed transmission time” in the definition of toll telephone service in § 4252. *See* I.R.C. § 4252(b)(1) (2000); *see also* *Fisk v. United States*, 70 U.S. 445, 447 (1865) (“In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe ‘or’ as meaning ‘and,’ and again ‘and’ as meaning ‘or.’”).

¹³³ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 80 (1993).

¹³⁴ *Am. Bankers Ins. Group v. United States*, 308 F. Supp. 2d 1360, 1364 (S.D. Fla. 2004), *rev’d*, 408 F.3d 1328 (11th Cir. 2005).

¹³⁵ *Id.*

¹³⁶ I.R.C. § 4252(b).

¹³⁷ *Office Max, Inc. v. United States*, 309 F. Supp. 2d 984, 995 (N.D. Ohio 2004) (“While the Court recognizes that the word ‘and’ can have different meanings . . . it does not believe that the use of the word ‘and’ in the phrase ‘distance and elapsed transmission time’ can be read other than in the conjunctive.”), *appeal docketed*, No. 04-4009 (6th Cir. Aug. 10, 2004); *Fortis, Inc. v. United States*, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686, at

on the principle that “statutes imposing a tax are [to be] construed liberally in favor of the taxpayer.”¹³⁸

Construing “and” to mean “or” in this particular provision was held to be an improper means for reading the distance element out of the statute thereby achieving application of the excise tax to current long-distance plans.¹³⁹ As noted by the majority, Congress did not indicate anywhere in the statute the intention to utilize the peculiar disjunctive meaning for the word “and,” which is generally an uncommon usage.¹⁴⁰ However, “and” was used in the disjunctive form in the very same section of the Code.¹⁴¹ The courts paid little attention to this fact and instead focused on the circumstances surrounding the statute’s enactment. At that time, long-distance charges were measured by both distance and length of the call.¹⁴² The billing structures of 1965 used “and” in its conjunctive form. Although the majority of courts were correct to respect-

*19 (S.D.N.Y. Sept. 16, 2004) (quoting in part *Brown v. Garner*, 513 U.S. 115, 118 (1994)) (“[A]mbiguity is a creature not of definitional possibilities but of statutory context Nothing in the grammatical structure or context of § 4252(b)(1) requires such atypical treatment of ‘and’ as ‘or.’”); *Nat’l R.R. Passenger Corp. v. United States*, 338 F. Supp. 2d 22, 27 (D.D.C. 2004) (“The Court has no doubt that Congress specifically intended to use ‘and’ rather than ‘or’ in § 4252(b)(1)(A) to reflect the technology of the day.”); *Reese Bros., Inc. v. United States*, No. 03-CV-745, 2004 WL 2901579, at *5 (W.D. Pa. Nov. 30, 2004) (“The fact that Congress may have intended ‘and’ to mean ‘or’ in other statutes or even other provisions of this statute, however, does not compel a different result here.”); *Honeywell Int’l, Inc. v. United States*, 64 Fed. Cl. 188, 198 (2005) (“For the reasons set forth by the courts in *Office Max*, *Amtrak*, *Fortis*, and *Reese*, we are likewise persuaded that the language of section 4252 is unambiguous.”); *Am. Online v. United States*, 64 Fed. Cl. 571, 577 (“[J]ust because ‘and’ may mean ‘or’ in some usages does not mean that in this instance its plain meaning is not apparent.”); *Hewlett-Packard v. United States*, No. C-04-03832, 2005 WL 1865419, at *3 (N.D. Cal. Aug. 5, 2005) (“This court agrees with the numerous other courts that have held the word ‘and’ in section 4252(b)(1) is unambiguously conjunctive.”).

¹³⁸ *Office Max, Inc.*, 309 F. Supp. 2d at 993 (quoting *The Limited, Inc. v. Comm’r of Internal Revenue*, 286 F.3d 324, 332 (6th Cir. 1987)); see *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (asserting that “if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer”).

¹³⁹ See cases cited *supra* note 137.

¹⁴⁰ *Id.*

¹⁴¹ *Office Max* Appellant Brief, *supra* note 6, at 27–28 (“As the *American Bankers Insurance Group* court observed, later in the very sentence that contains the phrase at issue, the word ‘and’ is used to connect § 4252(b)(1) to § 4252(b)(2), and it was undisputed that, because satisfaction of either prong would render the services taxable, this latter ‘and’ must be read as ‘or.’ In addition, the court in *American Bankers Insurance Group* correctly pointed out that in § 4251(a), the statute imposes a tax on ‘communications services’ and defines that term as meaning ‘(A) local telephone service; (B) toll telephone service; and (C) teletypewriter service,’ but that, since each type of service ‘is a separate and mutually exclusive type of service,’ the ‘and’ in § 4251(b) must also be read as ‘or.’”).

¹⁴² *Id.* at 34 (“In 1965, AT&T computed the charge for every traditional . . . long-distance call by multiplying the elapsed time of the call by a per-minute toll rate selected by matching the distance of the call against a group of mileage bands, each assigned a unique rate.”).

fully disagree with the *American Bankers Insurance Group* court regarding the interpretation of the word “and,” these courts were incorrect to conclude their inquiry at that point.¹⁴³

While the majority has held steadfast to the principles of interpreting the plain language of the statute¹⁴⁴ and the “rule against superfluities,”¹⁴⁵ it has lost sight of those principles when reading the word “distance.”¹⁴⁶ These courts erred through inconsistency of interpretation. Distance is defined as “the degree or amount of separation between two points, lines, surfaces, or objects in geometrical space measured along the shortest path joining them.”¹⁴⁷ Nowhere in this definition is an explicit or even implied requirement for a specified separation that would act as a threshold for sufficiency to be considered distance. Furthermore, “[e]ven under the mileage band system, there was no difference in the rate for calls placed to destinations within the same band, but spanning different distances.” Therefore, “[u]nder the District Court’s logic, the statute was never more than a nullity.”¹⁴⁸

The majority has stated that the new billing practices for long-distance calls have effectively removed distance from the calculation.¹⁴⁹ This is simply not

¹⁴³ As noted earlier, there is a general rule that when the language of the statute is clear and unambiguous, an inquiry into the meaning of the statute generally ends there; however, there are exceptions to this general rule. This Comment proposes that the federal excise tax on communications should be viewed as one of those exceptions. See *supra* notes 130–31 and accompanying text.

¹⁴⁴ See, e.g., *Office Max, Inc. v. United States*, 309 F. Supp. 2d 984, 1001 (N.D. Ohio 2004) (quoting *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 541 (1940)) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation.”), *appeal docketed*, No. 04-4009 (6th Cir. Aug. 10, 2004).

¹⁴⁵ *Hibbs v. Winn*, 124 S.Ct. 2276, 2286 (2004) (noting that a statute should not be construed to render any word inoperative).

¹⁴⁶ See *Office Max, Inc.*, 309 F. Supp. 2d at 996 (“Although in a broad sense distance may in some cases be indirectly implicated by the jurisdictional classifications at issue . . . distance in and of itself does not result in a variation in the charge, as required by § 4252(b)(1).”).

¹⁴⁷ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 658 (1993).

¹⁴⁸ *Office Max* Appellant Brief, *supra* note 6, at 54.

¹⁴⁹ See *Office Max, Inc.*, 309 F. Supp. 2d at 996 (finding that there was no “evidence that distance itself results in a variation” in long-distance charges); *Fortis, Inc. v. United States*, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686, at *13 (S.D.N.Y. Sept. 16, 2004) (asserting that “the term ‘distance,’ in the context of the statute, has a clear and much more specific meaning that does not encompass distinctions based on geopolitical units”); *Nat’l R.R. Passenger Corp. v. United States*, 338 F. Supp. 2d 22, 26 n.5 (D.D.C. 2004) (“IBM employs what it calls a ‘postalized’ fee structure . . . It is so named because, like a letter mailed through the United States Postal Service, the charge is the same whether the call is transmitted across town or across the country.”); *Reese Bros., Inc. v. United States*, No. 03-CV-745, 2004 WL 2901579, at *13 (W.D. Pa. Nov. 30, 2004) (“[I]t does not appear that the distinc-

true.¹⁵⁰ While distance factors less into the cost of a call than it did in 1965,¹⁵¹ it remains a factor nonetheless.¹⁵²

In order to compete with the flat-rate plans offered by cellular phones,¹⁵³ AT&T reduced the mileage band system, which was used for the majority of the twentieth century, from thirty-plus mileage bands to three bands: interstate, intrastate and international.¹⁵⁴ Although three mileage bands represent the same area as the thirty bands did in 1965,¹⁵⁵ the majority felt that these were simply “jurisdictional classifications” that serve “regulatory allocation purposes.”¹⁵⁶ Such a classification system supports the notion that although long-distance charges will still vary by distance, there is less opportunity for that distance charge to vary.¹⁵⁷ While it may be true that the mileage bands are representative

tions between intrastate and interstate calls necessarily correspond to the distance the call travels but rather on the political jurisdiction in which the call originates and terminates.”); *Honeywell Int’l, Inc. v. United States*, 64 Fed. Cl. 188, 199 (2005) (affirming the rationale used in the preceding courts’ decisions); *Am. Online, Inc. v. United States*, 64 Fed. Cl. 571, 581 (noting that even though billing differs for calls made between the United States and Canada, that distinction is not based on distance, rather the result of “geopolitical divisions”).

¹⁵⁰ Office Max Appellant Brief, *supra* note 6, at 33 (“[A] difference in distance alone would not necessarily have caused a variation in charge. The variation between charges results from the product of the distance toll rate and the elapsed transmission time as a mathematical function, not from a variation in the distance or in the distance toll rate.”).

¹⁵¹ Compare *id.* (“In 1965, the charge for all long-distance calls . . . was calculated by multiplying a distance toll rate (derived from mileage bands that the call crossed) and the elapsed transmission time of the call.”), with *Sykes*, *supra* note 17, at 215 (“Beginning in the first half of the 1990s, long-distance charges have been increasingly based upon the elapsed transmission time of the call, without regard to distance.”).

¹⁵² See, e.g., Pearce Declaration, *supra* note 3, at 15 (“A toll call is still defined by [sic] as a long-distance call since it travels over a long-distance network, using a variety of technological alternatives that are generally not used in local calling, and is clearly differentiated from a local call. A toll call is further differentiated from a local call because the billing information contains what is known as ‘call detail,’ i.e., the number that is called (which also gives the calling party a geographical location of the called party, e.g., the ‘area code’ of 213 designating Los Angeles and 212 designating New York City), the time and the length of the call, and finally the price of the call. As we have seen, since the mid-1960s the FCC has updated its own definition of toll services, based upon technological and marketplace imperatives, and aided by Court decisions and legislation.”).

¹⁵³ *Id.* at 13 (“[M]ost wireless carriers were offering fixed priced monthly plans with several hundred anytime, anywhere minutes, thus abandoning the concept of distance as a pricing component.”).

¹⁵⁴ See *id.* at 6 (“As distance became less important as a cost factor, due initially to technological developments and later to competitive trends, the mileage bands were reduced and/or eliminated.”); see also Office Max Appellant Brief, *supra* note 6, at 10.

¹⁵⁵ Pearce Declaration, *supra* note 3, at 6 (“The 30+ mileage bands went from 1–8 miles to one that was from 2,301 to 3,000 miles.”).

¹⁵⁶ Office Max, Inc. v. United States, 309 F. Supp. 2d 984, 996 (N.D. Ohio 2004), appeal docketed, No. 04-4009 (6th Cir. Aug. 10, 2004).

¹⁵⁷ Office Max, Inc., 309 F. Supp. 2d at 995; see Office Max Appellant Brief, *supra* note 6, at 10 (“The court also rejected the Government’s alternative contention that, at a mini-

of geopolitical divisions,¹⁵⁸ the fact remains that these bands still represent demarcations in distance.¹⁵⁹ Thus, these distance divisions cannot be ignored if we are to hold true to the principles of plain language interpretation. The majority has been so preoccupied with “giv[ing] effect . . . to every clause and word”¹⁶⁰ of the statute (and not reading distance out of the statute), that the courts have in fact altered the plain words of the statute by reading in new requirements for what constitutes distance.¹⁶¹ Thus, the courts have stepped into an inappropriate role, which was so carefully noted—“*only* Congress . . . may update the statutory text.”¹⁶²

The statutory language “must ordinarily be regarded as conclusive”¹⁶³ when the plain language is unambiguous “unless exceptional circumstances dictate otherwise.”¹⁶⁴ Exceptional results that are “absurd or futile” or “merely . . . unreasonable” permit the court to go beyond the literal language of the statute and examine extrinsic aids, including legislative history.¹⁶⁵ This Comment as-

sum, there were three remaining distance-based ‘bands,’ one for calls within states, another for calls between states and a third for calls between countries. Although the court acknowledged that ‘in a broad sense distance may in some cases be indirectly implicated by the jurisdictional classifications at issue,’ it concluded that ‘these jurisdictional classifications’ did not result in variation in the charge by ‘distance in and of itself.’”).

¹⁵⁸ See Proof Brief of the Plaintiff-Appellee at 50, *Office Max, Inc. v. United States*, No. 04-4009 (6th Cir. Aug. 10, 2004) (“[Section 2(b) of the Communications Act of 1934] establishes, among other things, a system of dual state and federal regulation over telephone service In broad terms, the Act grants to the FCC the authority to regulate ‘interstate and foreign commerce in wire and radio communication,’ while expressly denying that agency ‘jurisdiction with respect to . . . intrastate communication service’”) (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 260 (1986) (citing 47 U.S.C. §§ 151, 152(b)(2000))).

¹⁵⁹ See Pearce Declaration, *supra* note 3, at 6 (“[In 1965, t]hese so-called mileage bands varied widely, for example calls made within mileage bands 8, 9, 10 and 11, could vary widely in actual miles traveled and still be subject to the same rate, i.e., there was no variation in the rate paid by the customer.”). While certain calls made within various mileage bands were subject to the same rate in 1965, that class of calls has merely expanded since 2000; therefore, the tax should still apply.

¹⁶⁰ *Moskal v. United States*, 498 U.S. 103, 109 (1990) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

¹⁶¹ See *Office Max, Inc.*, 309 F. Supp. 2d at 996 (“[I]n a broad sense distance may in some cases be indirectly implicated by the jurisdictional classifications at issue.”).

¹⁶² *Nat’l R.R. Passenger Corp. v. United States*, 338 F. Supp. 2d 22, 23 (D.D.C. 2004) (emphasis added); see *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185–86 (1978) (“It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated. In any event, we discern no hint in the deliberations of Congress relating to the [law in question] that would compel a different result than we reach here.”).

¹⁶³ *Burlington N. R.R. Co. v. Okla. Tax Comm’n*, 481 U.S. 454, 461 (1987) (citing *United States v. James*, 478 U.S. 597, 606 (1986) (quoting *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980))).

¹⁶⁴ *Id.* at 461 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

¹⁶⁵ *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940) (“Often [the words

serts that each court in this line of cases, except the district court decision in *American Bankers Insurance Group*, is wrong because the literal interpretation of the statute leads to not only an unreasonable result, but an absurd one as well.

B. Are Results So Absurd to Require a Different Interpretation If the Plain Meaning Argument Fails?

The excise tax was created as a temporary means of financing a specific defense venture, namely the Spanish–American War.¹⁶⁶ Although originally designed to be a temporary revenue raiser, it proved quite useful and was reemployed in the early part of the twentieth century.¹⁶⁷ Congress then renewed and extended the tax during times of crisis and governmental need for easy revenue.¹⁶⁸ Each time Congress reenacted the tax, it was proposed as only a temporary measure.¹⁶⁹ Finally, this temporary tax measure, after being extended twenty-nine times,¹⁷⁰ was made permanent in 1990.¹⁷¹ However, the hope for repeal had not completely dissipated; there was a groundswell of support for repealing the telephone excise tax in 2000.¹⁷² The repeal, however, did not es-

of a statute] are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words.”).

¹⁶⁶ TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 2.

¹⁶⁷ *Id.* (“On September 4, 1914, President Wilson[, responding to a drop in imports,] called upon Congress to raise an additional \$100 million through ‘internal’ taxes (in contrast to customs duties) In response, Congress passed H.R. 18891 commonly known as the Emergency Internal Revenue Tax Act of 1914. The Act was mostly a renewal of the excises contained in the Spanish–American War Revenue Act.”).

¹⁶⁸ See generally *id.* (detailing the history of the federal excise tax on telephone service).

¹⁶⁹ TALLEY: TELEPHONE EXCISE TAX, *supra* note 32, at 2 (“The federal tax on long-distance calls has been levied on a continuous basis since passage of the *Revenue Bill of 1932* In the 1960s, 1970s, and 1980s, the federal telephone excise tax was repeatedly imposed on a temporary basis.”).

¹⁷⁰ TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 3 (“Today’s current telephone tax, derives from the *Revenue Bill of 1932*. Since then, it has been reauthorized 29 times.”).

¹⁷¹ Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, § 11217(a), 104 Stat. 1388–437.

¹⁷² H.R. REP. NO. 106-631, at 2 (2000) (Conf. Rep.) (attempting to phase out federal communications excise tax within a two-year period); see Bell, *supra* note 29; Press Release, U.S. Representative Rob Portman, House Moves to Repeal Spanish–American War Telephone Tax (Sept. 14, 2000) (on file with author) (“It’s been 102 years since President McKinley signed the ‘temporary’ phone tax into law to help pay the costs of the Spanish–American War. I hope the President will declare the Spanish–American War officially over by signing this repeal into law.”).

cape the budget battle between the White House and Congress.¹⁷³

This excise tax takes an unusual form because of its early history as a luxury tax.¹⁷⁴ Nevertheless, as telephones became more commonplace, it developed into something more along the lines of a user fee.¹⁷⁵ As a user fee, the revenues raised are supposed to be earmarked to provide specific services or to support the service on which the tax is levied.¹⁷⁶ However, the revenues raised from this tax are deposited into a general Treasury fund and may be used for any purpose, which the government deems fit.¹⁷⁷ Accordingly, it cannot be said that the communications excise tax is a true user fee.¹⁷⁸ The fact that the revenues from the tax are not allocated to a specific project or fund is also considered by some to be poor tax policy.¹⁷⁹ Because of this poor policy characterization, the federal excise tax never seemed to escape discussion of repeal. Due to the exponential growth of the telephone industry,¹⁸⁰ the telephone excise tax devolved into a regressive tax.¹⁸¹ Taxes are deemed regressive when the burden of the tax is significantly higher in proportion to earnings on those in the low-income bracket than it is on those in the high-income bracket.¹⁸² So, too, is the belief that this tax affects individual households in addition to taxes on their own phone service since businesses paying federal excise taxes on phone communi-

¹⁷³ Bell, *supra* note 29.

¹⁷⁴ See ADVISORY COMM'N ON ELEC. COMMERCE, *supra* note 43, at 26.

¹⁷⁵ ENTIN, *supra* note 14, at 5 ("Telephones may indeed have been a luxury for several decades . . . but falling costs and rising incomes eventually made them common appliances in most homes Today, we do not consider a telephone to be a luxury. Rather, having access to a telephone is considered a necessity"); see *supra* note 48 and accompanying text.

¹⁷⁶ *Id.* at 4 ("The telephone excise tax is not a user fee. It does nothing to promote phone service. All of it goes into general revenue. It is a pure money raiser.").

¹⁷⁷ See TALLEY: TELEPHONE EXCISE TAX, *supra* note 32, at 1; see also TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 2.

¹⁷⁸ ENTIN, *supra* note 14, at 1.

¹⁷⁹ Press Release, U.S. Representative Rob Portman, *supra* note 172 (noting that the federal excise tax on communications is regressive since it disproportionately affects lower-income Americans).

¹⁸⁰ See GARNET, *supra* note 44, at 160–63.

¹⁸¹ TALLEY: TELEPHONE EXCISE TAX, *supra* note 32, at 2–3 (noting that a 1987 study found that "among excises, those on alcoholic beverages and tobacco products would have less of an impact upon low-income families than those on telephone service"); see H.R. REP. NO. 106-631, at 5 (2000) (Conf. Rep.) ("[T]he burden of the excise tax on telephone service is regressive.").

¹⁸² ENTIN, *supra* note 14, at 5; see TALLEY: TELEPHONE EXCISE TAX, *supra* note 32, at 2–3 ("Excise taxes are labeled as regressive taxes to the extent that low-income people spend a higher fraction of their income on the taxed item than high-income people It was noted that the telephone excise tax would be assessed on nearly all low-income families since 94% of households had telephone service in 1999."). But see *id.* at 3 ("Supporters of the tax also note that federal programs to assist low income consumers gain access to and remain on the telephone network are in part supported indirectly (since telephone taxes go into the general fund) from the revenues this tax generates.").

cations simply pass that burden on to consumers.¹⁸³ However, there are federal programs, such as the Lifeline and Link-Up, designed to offset some of the burden of the federal communications excise tax for lower-income households.¹⁸⁴

The telephone excise tax was enacted to raise revenue through a tax on long-distance communications. At one time, long-distance was broadly defined as “a telephone or radio telephone message or conversation for which (1) there is a toll charge, and (2) the charge is paid within the United States.”¹⁸⁵ This definition was amended in 1965 to reflect AT&T’s¹⁸⁶ current pricing scheme and was designed to apply to all long-distance, except those services explicitly exempted in the statute.¹⁸⁷ It is clear that Congress intended to subject all commercial long-distance to the federal excise tax on communications. Thus, it seems absurd that a court could interpret the statute in a way that would essentially repeal the tax.

In *Honeywell International, Inc. v. United States*, the court noted that “policy considerations cannot override our interpretation of the text and structure of [a statute], except to the extent that they may help to show that adherence to the text and structure would lead to a result so bizarre that Congress could not have intended it.”¹⁸⁸ However, the court did not think it was bizarre, or even unreasonable, that its reading of the statute effectively eliminated the federal excise tax on the majority of long-distance communications as they are billed today. Congress could not possibly have intended to create a statute that applied to so little, especially since this particular tax is such “an important source of revenue for the Federal Government.”¹⁸⁹

The current state of the economy is another reason for the absurdity of the majority’s view.¹⁹⁰ The federal excise tax lost its “temporary” status after

¹⁸³ TALLEY: TELEPHONE EXCISE TAX, *supra* note 32, at 2.

¹⁸⁴ *Id.* at 3–4 (noting that these programs are funded in part from the general Treasury receipts that are partially funded through the federal excise tax). The Lifeline program is one that assists low-income households by reducing monthly telephone bills by an amount up to the residential subscriber-line charge. KENNEDY, *supra* note 3, at 187. Link Up is a program by which telephone installation charges are reduced for low-income households. *Id.*

¹⁸⁵ Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, § 133, 72 Stat. 1289–90.

¹⁸⁶ Pearce Declaration, *supra* note 3, at 7 (noting that AT&T was the dominant provider of long-distance services for the first century of telephone services).

¹⁸⁷ I.R.C. § 4253 (2000) (listing the exempted services).

¹⁸⁸ Cent. Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 188 (1994).

¹⁸⁹ S. REP. NO. 89-324, at 35 (1965).

¹⁹⁰ Am. Standard Watch Co. v. Comm’r, 229 F.2d 672, 675 (2d Cir. 1956) (“The need today for governmental revenue is indeed great, but not so great as to justify, the stingy statutory interpretation the Commissioner here espouses. The country is not that hard up.”). This Comment asserts that in 2005 the country is indeed that “hard up.” See *infra* note 194 and accompanying text.

ninety years largely due to the fact that the United States faced great budget deficits and needed the income generated by the tax.¹⁹¹ When those budget deficits disappeared in 2000, the move to repeal the tax was again an issue.¹⁹² That effort to repeal ultimately failed due to a veto by President Clinton.¹⁹³

In 2005, those deficits are back and larger than ever.¹⁹⁴ Federal Reserve Chairman Alan Greenspan stated:

When you begin to do the arithmetic of what the rising debt level implied by the deficits tells you, and you add interest costs to that ever-rising debt, at ever-higher interest rates, the system becomes fiscally destabilizing . . . Unless we do something to ameliorate it in a very significant manner, we will be in a state of stagnation.¹⁹⁵

Avoiding that “state of stagnation”¹⁹⁶ certainly would not be aided by eliminating the nearly \$1.6 billion in projected revenue from the excise tax on long-distance telephone service.¹⁹⁷ It is clear from the construction of the statute that Congress intended to raise revenue by taxing all commercial long-distance, save the exceptions explicitly noted in the statute.¹⁹⁸ By excluding a tax on

¹⁹¹ TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 6. (“Since the tax had been a continuous revenue source since 1932 and because of the large continuing budget deficits, Congress concurred with the President’s recommendation and made the tax a permanent part of our tax revenue structure . . .”); *see also id.* (explaining that when President George H. W. Bush submitted his budget in 1990 it included a proposal calling for the federal excise tax to be made permanent at 3%). The tax was made permanent by a President who stated during his nomination speech at the GOP national convention in 1988: “Read my lips. No new taxes.” *See* Character Above All: George Bush Glossary, <http://www.pbs.org/newshour/character/glossaries/bush.html> (last visited Oct. 8, 2005). Although this tax was not exactly “new” per se, President Bush saw the dire economic situation and was inspired to be the first President to make the federal excise tax on communications permanent. *Id.*

¹⁹² Press Release, U.S. Representative Rob Portman, *supra* note 172; *see generally* H.R. REP. NO. 106-631 (Conf. Rep.).

¹⁹³ Kay Bell, *supra* note 29 (explaining that President Clinton vetoed the repeal of the telephone excise tax because his education initiatives were not funded).

¹⁹⁴ The Congressional Budget Office (“CBO”) projects the following yearly deficits: (1) \$331 billion in 2005; (2) \$314 billion in 2006; (3) \$324 billion in 2007; (4) \$335 billion in 2008; (5) \$321 billion in 2009; (6) \$317 billion in 2010; and (7) \$218 billion in 2011. *See* Congressional Budget Office’s Current Budget Projections, <http://www.cbo.gov/showdoc.cfm?index=1944&sequence=0> (last visited Sept. 10, 2005). These budget projections will likely show greater deficits when the CBO updates these projections since they do not reflect the billions, which have been pledged to aid the Gulf Coast in the wake of Hurricane Katrina. *See* David E. Sanger & Edmund L. Andrews, *Bush Rules Out a Tax Increase for Gulf Relief*, N.Y. TIMES, Sept. 17, 2005, at A1. *But see* Michael A. Fletcher & Jonathan Weisman, *Bush Says Spending Cuts Will Be Needed*, WASH. POST, Sept. 17, 2005, at A01 (noting that the Bush Administration promises that “[t]his in no way will adversely impact [President Bush’s] commitment to cut the deficit in half by 2009”).

¹⁹⁵ Edmund L. Andrews, *Greenspan Says Budget Deficits Can’t Continue*, N.Y. TIMES, Mar. 3, 2005, at A1.

¹⁹⁶ *Id.*

¹⁹⁷ Office Max Appellee Brief Proof, *supra* note 10, at 31.

¹⁹⁸ *See supra* note 100 and accompanying text.

long-distance that does not superficially vary with distance and elapsed time, the courts will exclude essentially all long-distance from taxation thereby defeating the entire purpose of the law.¹⁹⁹ It is for Congress, not the courts, to repeal a law.

C. The Reenactment Doctrine

The current statutory language for the federal excise tax on communications was drafted in 1965. Since its original promulgation, the life of the tax has been extended or amended ten times²⁰⁰ until finally attaining permanent status in 1990.²⁰¹ Congress publicized its intent to tax all commercial long-distance when it amended the definition in 1965 to reflect the long-distance services offered at the time.²⁰² It provided two specific provisions to cover the two available types of toll telephone service,²⁰³ which Congress intended to tax.²⁰⁴ Rather than allow any type of service that did not fall within the statute's definition of toll telephone service to escape taxation, Congress expressly included narrow exemptions²⁰⁵ from the tax. Thereby, Congress clarified its intent to tax all phone service except that for which it provided.²⁰⁶

Congress did not anticipate the great changes that were to occur in the telephone world, such as the demise of the Bell System²⁰⁷ or the vast number of technological advances.²⁰⁸ While the language of the statute has remained

¹⁹⁹ As discussed earlier, most, if not all, long-distance carriers have shifted away from the traditional billing practices that were tied to mileage bands; therefore, if the majority of long-distance is billed in a way that cannot be taxed under the majority view of the statute, then the excise tax on long-distance communications will be essentially repealed. *See supra* notes 56–60 and accompanying text.

²⁰⁰ *See* TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 9–10.

²⁰¹ Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, § 11217(a), 104 Stat. 1388–437.

²⁰² Excise Tax Reduction Act, Pub. L. No. 89-44, § 302, 79 Stat. 136, 145–46.

²⁰³ These two types of service are traditional long-distance telephone service and WATS (Wide Area Telecommunications Service). *Id.* at 146.

²⁰⁴ *See* Office Max Appellant Brief, *supra* note 6, at 20–21.

²⁰⁵ I.R.C. § 4253 (2000); *see supra* note 100 and accompanying text.

²⁰⁶ Congress again demonstrated its intent to tax all but the stated exceptions when it drafted special rules to apply the excise tax to prepaid telephone cards. *Cf.* Treas. Reg. § 49.4251-4(a) (2000) (explaining rules for the application of the federal excise tax to prepaid telephone calls).

²⁰⁷ *United States v. AT&T*, 552 F. Supp. 131, 226–34 (D.D.C. 1982) (setting out the provisions of the AT&T reorganization order).

²⁰⁸ Since 1965, the cost for telephone operations has dramatically fallen, the cell phone was invented (and their numbers expanded exponentially), and consumers now have the option of avoiding traditional or cellular telephone service altogether with the new Voice over Internet Protocol technology. *See generally* Pearce Declaration, *supra* note 3, at 10–12. *See* discussion *infra* Sections II.D, III (taking an in-depth look at the effect of the excise tax on VoIP).

static, the interpretation has not. In 1979, the IRS issued Revenue Ruling 79-404, which provided for certain telephone services to be taxed even when those charges do not vary directly with distance.²⁰⁹ This twenty-four year old interpretation is being questioned for the first time even though the statute at issue has been reenacted six times since the IRS issued its revenue ruling.²¹⁰ The re-enactment doctrine stands for the proposition that “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”²¹¹

Ordinarily, a court is bound by an agency’s interpretation of a statute “unless [it is] arbitrary, capricious, or manifestly contrary to the statute.”²¹² Interpreting the statute to reflect the current long-distance billing practices is neither arbitrary nor capricious. Furthermore, such an interpretation is not “manifestly contrary to the statute.”²¹³ In fact, the interpretation by the majority is counter to the reasonable construction of the statute.²¹⁴ As noted in *Chevron, U.S.A. v. Natural Resources Defense Council*, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”²¹⁵ Since an agency “is entrusted to administer” a particular statutory scheme, its interpretations should be afforded “considerable weight.”²¹⁶ Furthermore, “a revenue ruling is entitled to as much weight as its persuasiveness allows, much like a decision from a different cir-

²⁰⁹ Rev. Rul. 79-404, 1979-2 C.B. 382.

²¹⁰ Even though there was a massive lobbying effort to repeal the federal excise tax on communications in 2000, the lobbyists focused their multi-million dollar efforts on repealing the tax because it was poor tax policy. See Judy Sarasohn, *Calling for Phone Tax Repeal*, WASH. POST, Apr. 6, 2000, at A21. See generally U.S. Lobby Registration and Reporting Disclosure Page, <http://sopr.senate.gov> (last visited Oct. 5, 2005) (searching by name of telecommunication companies in 2000). The coalition of anti-excise tax groups missed their best argument for repeal—that the language of the statute was obsolete. Long-distance billing structures were altered several years before this lobbying effort was underway. However, the Joint Committee on Taxation did note as early as 2001 that “the [excise tax on communications] provisions are so obsolete that, in many cases, they either fail to capture many services that traditionally were seen as within the scope of the communications tax or they capture those services unevenly.” 2 STAFF OF J. COMM. ON TAXATION, STUDY OF THE OVERALL STATE OF THE FEDERAL TAX SYSTEM AND RECOMMENDATIONS FOR SIMPLIFICATION, PURSUANT TO SECTION 8022(3)(B) OF THE INTERNAL REVENUE CODE OF 1986, at 505–06 (Comm. Print 2001) [hereinafter STUDY OF THE FEDERAL TAX SYSTEM].

²¹¹ *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

²¹² *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

²¹³ *Id.*

²¹⁴ The majority’s strict interpretation of the statute would substantially reduce the collection of the federal excise tax on long-distance services. However, in the event that the majority continues to win and the strict, literal interpretation must stand, there may be an opportunity for the IRS to continue collection, albeit through a different means. See discussion *infra* Sections II.D, III.

²¹⁵ *Chevron U.S.A.*, 467 U.S. at 844 (footnote omitted).

²¹⁶ *Id.* (citation omitted).

cuit can be persuasive but is not binding” on a court in another circuit.²¹⁷

The majority of district courts have asserted that the IRS’s interpretation is not reasonable since the IRS concedes that certain services will be taxed even though they fall outside of the statutory requirement for a “charge which varies in amount with the distance and elapsed transmission time.”²¹⁸ While the IRS acknowledged that this service falls outside of the specific statutory definition of toll telephone service, it is not unreasonable for the agency to tax the particular service considering that it was not specifically exempted and that the statute was created with the intention of taxing all commercial long-distance.²¹⁹

Although the Supreme Court later stated in *United States v. Mead Corp.*²²⁰ that the *Chevron* analysis was to be used only when “the statutory interpretation is recorded in a regulation that was subject to notice-and-comment rulemaking or was promulgated in a manner similar to formal rulemaking,”²²¹ revenue rulings should nevertheless receive the same standard of deference set forth in *Chevron*. Revenue rulings are formal opinions rendered by the IRS, which are not subject to notice-and-comment periods and are not binding opin-

²¹⁷ *Am. Bankers Ins. Group v. United States*, 308 F. Supp. 2d 1360, 1371 (S.D. Fla. 2004), *rev’d*, 408 F.3d 1328 (11th Cir. 2005).

²¹⁸ I.R.C. § 4252(b)(1)(A) (2000); *see Office Max, Inc. v. United States*, 309 F. Supp. 2d 984, 999 (N.D. Ohio 2004) (“[T]he Court finds that the reasoning set forth in Revenue Ruling 79-404 is not reasonable and, therefore, entitled to no deference.”), *appeal docketed*, No. 04-4009 (6th Cir. Aug. 10, 2005); *Fortis, Inc. v. United States*, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686, at *11 (S.D.N.Y. Sept. 16, 2004) (“[E]ven under the more deferential standard, Revenue Ruling 79-404 is not entitled to deference because it is inconsistent with the unambiguous definition of toll telephone service in § 4252(b)(1).”); *Nat’l R.R. Passenger Corp. v. United States*, 338 F. Supp. 2d 22, 28 n.6 (D.D.C. 2004) (“The Court is unpersuaded by the reasoning in Revenue Ruling 79-404, which cannot overrule a clear statutory requirement.”); *Reese Bros., Inc. v. United States*, No. 03-CV-745, 2004 WL 2901579, at *10 (W.D. Pa. Nov. 30, 2004) (“[I]t appears that the IRS’s reliance on *American Trucking* and the statute’s legislative history when it issued Revenue Ruling 79-404 was not well reasoned and, thus, it appears that the ruling should be given little, if any, deference.”); *Honeywell v. United States*, 64 Fed. Cl. 188, 200 (2005) (“This court has nothing to add to the well-reasoned and articulate decisions on the issue in *Office Max*, *Fortis*, and *Reese*, and adopts the conclusions and analyses set forth on this issue in those cases.”); *Am. Online, Inc. v. United States*, 64 Fed. Cl. 571, 580 (2005) (“Revenue Ruling 79-404 is not thoroughly considered, it incorporates the concession that the literal meaning of the statute differs from the results it reaches”); *Hewlett-Packard v. United States*, No. C-04-03832, 2005 WL 1865419, at *4 (N.D. Cal. Aug. 5, 2005) (“Since the court has concluded the statute is unambiguous, it need not give deference to Revenue Ruling 79-404, nor determine the proper level of deference.” (citation omitted)).

²¹⁹ *See Office Max Appellant Brief*, *supra* note 6, at 48 (“[A]s the *American Bankers Insurance Group* court pointed out here ‘there is other evidence that Congress understood the definition of toll telephone service to include all long-distance telephone calls, even those that varied only by time.’” (citation omitted)).

²²⁰ *United States v. Mead Corp.*, 533 U.S. 218, 230–33 (2001).

²²¹ *Am. Bankers Ins. Group*, 308 F. Supp. 2d at 1371 (citing *Mead Corp.*, 533 U.S. at 230–33).

ions; however, they can have “the force of law.”²²² Therefore, despite the strict *Chevron* and *Mead* standards, revenue rulings should be afforded the deference that has been reflected in recent circuit court decisions.²²³ The weight of deference has never been explicitly quantified, but it has been stated that revenue rulings are due “substantial judicial deference.”²²⁴ Such deference to administrative agency determinations has been articulated by the Supreme Court on more than one occasion.²²⁵

The federal excise tax on communications has been reenacted eleven times since 1965 and six times since Revenue Ruling 79-404 was issued.²²⁶ Furthermore, Congress has not made substantive changes to the core law, the focus of this Comment, other than granting the tax permanent status in 1990.²²⁷

The reenactment doctrine has faced trouble in the courts, because it “tends to be applied when there is reason, either based on the nature of regulatory interpretations or the context of the reenactment, to presume that Congress was aware of the interpretation, which it was supposedly adopting.”²²⁸ Additionally, it was noted that a “few isolated statements” are not sufficient to constitute notice.²²⁹ Therefore, the question is whether Congress received sufficient notice of the IRS’s interpretation of § 4251 and acquiesced to this construal.

Although the IRS issued Revenue Ruling 79-404 in 1979,²³⁰ Congress seem-

²²² See Office Max Appellant Brief, *supra* note 6, at 43–44 (“The IRS promulgates revenue rulings pursuant to its statutory authority ‘to prescribe all needful rules and regulations for the enforcement of’ the Code. Revenue rulings are formal interpretative rulings involving substantive tax law, Treas. Reg. [§] 601.601(d)(2)(v)(a) . . . [R]evenue rulings have legal force and effect in that they constitute ‘precedents to be used in the disposition of other cases’ that ‘may be cited and relied upon for that purpose.’ Treas. Reg. § 601.601(d)(2)(v)(d).” (citations omitted)).

²²³ John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 82–84 (1995) (“In recent years, circuit courts have uniformly held that Revenue Rulings receive significant deference, although only the Sixth Circuit has granted them *Chevron* deference. The shift by circuit courts toward more uniform deferential review of Revenue Rulings may reflect their perception that the Supreme Court has adopted a more deferential posture toward agency interpretations generally.”).

²²⁴ *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (“[T]he Revenue Rulings themselves are entitled to deference. In this case, the Rulings simply reflect the agency’s longstanding interpretation of its own regulations. Because that interpretation is reasonable, it attracts substantial judicial deference.”).

²²⁵ *E.g.*, *Helvering v. Winmill*, 305 U.S. 79, 83 (1938) (“Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.”); see *Cottage Savings Ass’n v. Comm’r*, 499 U.S. 554 (1991).

²²⁶ TALLEY: FEDERAL EXCISE TAX ON TELEPHONE SERVICE, *supra* note 30, at 9–10.

²²⁷ Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, § 11217(a), 104 Stat. 1388–437.

²²⁸ *Fortis, Inc. v. United States*, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686, at *38 (S.D. N.Y. Sept. 16, 2004).

²²⁹ *Id.* at *41.

²³⁰ Rev. Rul. 79-404, 1979-2 C.B. 382.

ingly lacked notice of that interpretation as late as 2000, when Congress made its last effort to repeal the federal excise tax.²³¹ In 2001, however, law firms, accounting firms, and corporate taxpayers began a vigorous campaign to request refunds based on the obsolete language of the statute.²³² In order to limit litigation and avoid widespread publicity, the IRS began to settle these claims. While the IRS was attempting to minimize the public focus on these settlements, it is certainly likely Congress was aware of these settlement expenditures and that IRS officials alerted Congress as to the need to update the statute. Furthermore, *Cottage Savings* noted that long-standing regulations and interpretations “are deemed to have received congressional approval.”²³³ Therefore, irrespective of the court in *Fortis*²³⁴ and other district court holdings that Congress lacked sufficient notice, the Supreme Court follows the theory of constructive notice.²³⁵ There is ample reason, given the press of the litigation in this situation, to believe that Congress received notice of the IRS interpretation. Lastly, “[w]hether or not subsequent Congresses were aware of Revenue Ruling 79-404, these Congresses clearly understood sections 4251 and 4252 to impose a tax on all commercial long-distance service, not just service where the toll rate actually varied by both distance and time.”²³⁶

²³¹ See generally H.R. REP. NO. 106-631 (2000) (Conf. Rep.).

²³² One could theorize that these lawsuits are a direct result of the study prepared by the staff of the Joint Committee on Taxation, which concedes that the language of the federal excise tax on communications is a “source of complexity” for several reasons and the “present Code provisions [should] be updated to reflect current technology.” STUDY OF THE FEDERAL TAX SYSTEM, *supra* note 210, at 504–05 (2001); see LEVINE, BLASZAK, BLOCK & BOOTHBY, LLP, FEDERAL EXCISE TAX REFUNDS COULD BE PAID IN FULL, <http://www.lb3law.com/docs/VoiceReport100603.cfm> (Oct. 6, 2003) (“After the customary initial rejection and an appeals process, telecom managers and auditing firms say they’ve come away with between 33¢ and 39¢ on the dollar—the standard settlement the IRS appeals staff has been handing back to overtaxed enterprises.”).

²³³ *Cottage Savings v. Comm’r*, 499 U.S. 554, 561 (1991) (citing *United States v. Correll*, 389 U.S. 299, 305–06 (1967) (quoting *Helvering v. Winmill*, 305 U.S. 79, 83 (1938))); see Office Max Appellant Brief, *supra* note 6, at 48 (“The Supreme Court in *Cottage Savings* made it clear, however, that actual congressional knowledge of the IRS position is not a prerequisite to the application of the reenactment doctrine.”).

²³⁴ *Fortis, Inc. v. United States*, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686, at *43 (S.D. N.Y. Sept. 16, 2004).

²³⁵ See *Cottage Savings*, 499 U.S. at 560–61 (“Because Congress has delegated to the Commissioner the power to promulgate ‘all needful rules and regulations for the enforcement of [the Internal Revenue Code],’ 26 U. S. C. § 7805(a), we must defer to his regulatory interpretations of the Code so long as they are reasonable.”).

²³⁶ *Am. Bankers Ins. Group v. United States*, 308 F. Supp. 1360, 1373 (S.D. Fla. 2004), *rev’d*, 408 F.3d 1328 (11th Cir. 2005).

D. The Current Statute As Applied to New Technology

If the *American Bankers Insurance Group* appellate decision²³⁷ is any indication of the upcoming telephone excise tax battles in court, the IRS should also lobby for a legislative remedy. Furthermore, the proposed regulations²³⁸ would apply on a prospective basis,²³⁹ so the current refund claims should only prove to be a temporary drain on tax revenues.²⁴⁰

The major focus of the communications excise tax controversy has been the language of § 4252(b)(1).²⁴¹ However, a solution may lie within § 4252(b)(2). This part of the federal excise tax on communications is applicable to all services that:

entitle[] the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.²⁴²

While the current technologies were not contemplated at the time the statute was enacted, its language could certainly be construed to cover specific modern-day technologies²⁴³ even without revising the statute.²⁴⁴ A broad interpretation of the federal excise tax on communications would permit the government to maintain the projected revenues raised through this excise tax.

Voice over Internet Protocol ("VoIP") in its most simple terms is technology that permits a user to make a telephone call utilizing a computer network by converging "voice and data into a single digit bit stream."²⁴⁵ Although Con-

²³⁷ 408 F.3d 1328 11th Cir. (2005).

²³⁸ Prop. Treas. Reg. § 49.4252-0, 68 Fed. Reg. 15690 (Apr. 1, 2003) (amending the statutory definition of toll telephone service to remove the distance requirement).

²³⁹ *Id.* (noting that the proposed regulations "appl[y] to amounts paid on and after the date of publication of these regulations in the Federal Register as final regulations").

²⁴⁰ Taxpayers are only allowed to make refund claims within three years after a return is filed or two years from the date a tax is paid. *See* I.R.C. § 6511(a) (2000).

²⁴¹ *See* discussion *supra* Sections II.A, II.C (explaining the primary problem in the statute is that current long-distance is not tolled by both distance *and* elapsed time).

²⁴² I.R.C. § 4252(b)(2) (2000).

²⁴³ *See*, for example, flat-rate long-distance plans, such as AT&T's Unlimited Plus Plan and Vonage's flat-rate broadband phone service. *See* AT&T Unlimited Plus Plan, http://www.shop.att.com/wrapper?portal=shopatt&product=shopatt_orunlimp&service=ld&bannerid=NTD038TXTHP (last visited June 30, 2005); *see also* VONAGE, <http://www.vonage.com/tech/> (last visited June 30, 2005).

²⁴⁴ This, however, would only capture a very small amount of the revenue lost from the outdated toll telephone language. Additionally, such an option would not be as wise as revising the statute to reflect modern technology. Further, it would be in Congress' best interest not to tailor the statutory language so narrowly as to exactly reflect the technology of today, but to use broad language in order to allow the statute to evolve with advances in communications technologies.

²⁴⁵ *In re Excise Taxes; Communications Services, Comments of the National Cable and Telecommunications Association*, REG 137076-02, 2 (Sept. 30, 2004),

gress has made clear its intentions to keep Internet technology tax-free and minimize regulatory burdens,²⁴⁶ mixed voice and data technologies, such as VoIP, fall somewhere between the traditional distinctions of telecommunications and information services. Therefore, they potentially fall within the scope of the communications excise tax.²⁴⁷ Furthermore, as these mixed technologies begin to be regulated in a manner closer to one service or the other,²⁴⁸ arguments become stronger for those services also to be taxed like the traditional services. The FCC has recently enacted new regulations, which are very similar to regulations on traditional telephone service. These new regulations require VoIP providers to furnish their users access to E911 services and allow users to receive calls from and place calls to the public switched telephone network, which is the traditional telephone network.²⁴⁹ The FCC acknowledges that these regulations are similar to those placed on traditional telephone providers.²⁵⁰ As new regulations imposed on new technology gravitate towards traditional regulations and traditional technology, it will be difficult to justify the disparate tax treatment between the two.

III. OUTLOOK

Although the government has not proven successful in their legal quest for application of the federal excise tax to current communications services, the IRS has indicated that it has no intention to discontinue its collection of the tax.²⁵¹ Section 7805 of the Internal Revenue Code authorizes the Secretary of

http://www.ncta.com/pdf_files/IRS_EXCISE_TAXES_093004.pdf. Although VoIP is a phone service in that it allows people to communicate via telephone, the communications data is shipped as data packets, which is the difference between VoIP and traditional telephone service. See generally Roy Mark, *IRS Denies VoIP Tax Plan Claims*, INTERNET-NEWS.COM (July 16, 2004), <http://www.internetnews.com/infra/article.php/3382131>.

²⁴⁶ See, e.g., VoIP Regulatory Freedom Act of 2004, S. 2281, 108th Cong. (2004) (restricting taxation of VoIP).

²⁴⁷ See Declan McCullagh, *IRS Eyes Net Phone Taxes*, CNETNEWS.COM, July 6, 2004, http://news.zdnet.com/2100-9584_22-5258809.html?tag=sas.email.

²⁴⁸ See Press Release, Federal Communications Commission, Commission Requires Interconnected VoIP Providers to Provide Enhanced 911 Service (May 19, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-258818A1.pdf. See generally *In re IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, *First Report and Order and Notice of Proposed Rulemaking*, FCC 05-116 (2005).

²⁴⁹ *In re IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, *supra* note 248.

²⁵⁰ *Id.*

²⁵¹ I.R.S. Notice 2004-57 ("This notice confirms that the Service will continue to assess and collect tax under section 4251 of the Code on all taxable communications services, including those communications services recently litigated with conflicting results."). See also I.R.S. Notice 2005-79 ("[T]he government will continue to litigate this important issue . . . [and] the Service will continue to assess and collect the tax under § 4251 on all taxable com-

the Treasury to prescribe “all needful rules and regulations for the enforcement of [the Code].”²⁵² Regulations issued under this statute are considered interpretive regulations intended to clarify a current statutory scheme.²⁵³ On April 1, 2003, the Treasury issued a notice of proposed rulemaking²⁵⁴ providing “[f]or a communications service to constitute toll telephone service described in section 4252(b)(1), the charge for the service need not vary with the distance of each individual communication.”²⁵⁵ The proposed rule fixes the problem at issue in all of the cases discussed in this Comment by updating the statute to reflect the current long-distance billing practices. It also gives the statute some flexibility to grow with technology as it continues to evolve.

Moreover, “if the regulation becomes final, a taxpayer suing to recover a tax refund respecting charges for long-distance service would have to demonstrate the regulation does not implement the statute in a reasonable manner.”²⁵⁶ The majority of courts will most likely continue to argue that taxing all long-distance under this provision is unreasonable; however, as demonstrated by the legislative history of the statute in addition to other overwhelming evidence, it is clear that Congress intended to continue to raise a substantial amount of money through this tax.²⁵⁷ A taxpayer would bear the substantial burden of proving this clarifying regulation is not reasonable. The proposed regulation simply mirrors the longstanding view of the IRS towards this revenue raising provision, which has been the subject of constant debate for over 100 years.²⁵⁸

One wonders how many more court cases it will take to resolve this issue. If corporate taxpayers witness other companies receiving large refunds as a result of these suits, surely the caseload will continue to increase. How many suits will the government continue to defend until it decides that the courts are not favorable to their arguments? It is easy to imagine that this litigation will continue until the Supreme Court or Congress provides a definitive answer.²⁵⁹ Congress seems reluctant, however, to step in due to the current political climate: the 2004 elections had a primary focus on tax policy and in particular,

munications services[. . .]).

²⁵² I.R.C. § 7805 (2000).

²⁵³ Sykes, *supra* note 17, at 217 n.7.

²⁵⁴ Prop. Treas. Reg. § 49.4252-0, 68 Fed. Reg. 15,690 (Apr. 1, 2003).

²⁵⁵ *Id.*

²⁵⁶ Sykes, *supra* note 17, at 217 n.7 (“The Notice of Proposed Rulemaking issued by the IRS (citation omitted), identifies section 7805 as the authority for the regulation, so the regulation, if issued, would be classified as interpretive By contrast, *legislative* regulations—which are more difficult to overturn—are issued under a specific statutory grant of rulemaking authority.”).

²⁵⁷ *See supra* note 77.

²⁵⁸ *See* Rev. Rul. 79-404, 1979-2 C.B. 382.

²⁵⁹ *See generally* Rojas, *supra* note 65, at 413.

tax cuts.²⁶⁰ No member of Congress wants to take responsibility and reinvigorate such a seemingly minor tax that has had a wildly unpopular 100-year history.²⁶¹ While it is impossible to predict what, if anything, Congress will do, one thing is for sure—the statute needs to be updated not only for current telephone billing practices, but also to allow for technology to continue to grow.²⁶² The importance of this statute cannot be stated enough as the budget for many years to come depends in part on this stable income source.²⁶³

While no member of Congress has risen to the challenge to sponsor legislation updating the language of the statute, congressional committees, such as the Joint Committee on Taxation, are proposing several options.²⁶⁴ Specifically, the Joint Committee proposed three options that vary in degree of “fundamental change.”²⁶⁵ The first option simply updates the statutory language making current local and long-distance services taxable under the statute.²⁶⁶ This option is very similar to the proposed Treasury regulations in that it modifies the current statutory language but does not address the tax treatment of any new technology.²⁶⁷ The Joint Committee’s second proposal would tax all voice communications, “regardless of its technical form,” in addition to revising the list of exemptions.²⁶⁸ The final and most expansive proposal suggests that, in addition to the changes made in the second option, “the communications excise tax base

²⁶⁰ SCOTT HODGE, TAX FOUND., REFORM IS ON THE WAY? TAX POLICY AND THE 2004 ELECTIONS (2004), <http://www.taxfoundation.org/news/show/159.html>.

²⁶¹ U.S. Representative Gary Miller of California initiated an effort to repeal the tax in the House of Representatives, which has 135 co-sponsors, and Senator Rick Santorum of Pennsylvania introduced the related Senate bill which boasts eight co-sponsors. See Telephone Excise Tax Repeal Act of 2005, H.R. 1898, 109th Cong., (2005); see also S. 1321, 109th Cong., (2005). See generally TALLEY: TELEPHONE EXCISE TAX, *supra* note 32, at 2–5. But see John Dickerson, *Pity the Poor Fiscal Conservative*, SLATE, Sept. 20, 2005, <http://www.slate.com/id/2126637> (arguing that although there is “a game of chicken between Congress and the White House,” the current deficit projections may bring about a period where the advice of “fiscal nitpickers” is heeded).

²⁶² Rojas, *supra* note 65, at 414 (noting that the FCC may “ultimately push Congress to revisit the seemingly antiquated phone tax rules, although . . . any potential phone tax overhaul ‘should be a basement to attic rewrite’ rather than a collection of piecemeal fixes that might require periodic fine-tuning”).

²⁶³ See CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2005–2014, CBO’S PROJECTIONS OF EXCISE TAX RECEIPTS, BY CATEGORY 87, tbl.4-8 (2004), <http://www.cbo.gov/ftpdocs/49xx/doc4985/01-26-BudgetOutlook-EntireReport.pdf>.

²⁶⁴ See generally STAFF OF J. COMM. ON TAXATION, 109TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES (Comm. Print 2005), <http://www.house.gov/jct/s-2-05.pdf>.

²⁶⁵ *Id.* at 372–73.

²⁶⁶ *Id.* at 373.

²⁶⁷ Compare STAFF OF J. COMM. ON TAXATION, *supra* note 264, at 373, with Prop. Treas. Reg. § 49.4252-0, 68 Fed. Reg. 15,690 (Apr. 1, 2003).

²⁶⁸ STAFF OF J. COMM. ON TAXATION, *supra* note 264, at 373–75 (stating that certain exemptions, such as those for the press, common-carriers and networks would be expanded, while the exemption for private communications services would be limited).

[will be] . . . expanded to include all data communications services to end-users.”²⁶⁹ Currently, no action has been taken on the Joint Committee’s proposals; however, this committee is considered extremely influential, and its proposals are often the precursors to new tax laws.²⁷⁰

IV. CONCLUSION

There is no doubt that the current statutory framework is in dire need of updating. With the advent of new technologies and the changes within the traditional long-distance industry, “a basement to attic rewrite”²⁷¹ should be undertaken rather than more disjointed attempts to modernize the tax code. The statute requires too much analytical thinking in order to achieve Congress’ desired effect. Congress should clarify and update the language not only to reflect the current billing practices of communications companies, but also to inject flexibility in the statute enabling it to grow with the telecommunications field, a field known for its rapid advancements.

A quick reading of the taxation statute pressed upon toll telephone services “which varies [the taxes assessed depending upon] . . . the distance and elapsed transmission time,”²⁷² may indicate that current long-distance billing practices would fall outside of the services taxed by the federal communications excise tax. However, further analysis into the plain language of the statute indicates that “and” may sometimes mean “or.” Additionally, the majority of courts have erred in their reading of the word “distance.” The statute does not prescribe any specificity regarding distance. Nevertheless, by conceding that actual distance was in some way implicated, the long-distance charges meet the vague statutory threshold for taxation of charges that vary by distance and elapsed time. Although that calculation of distance is not the same as it was in 1965, the definition of distance, as defined by the statute, is still satisfied. If the courts were to apply the majority logic, and strictly, yet superficially, read the language of the statute, they would reach the unreasonable result of drastic reductions in the amount of revenue raised. For a provision to be noted as a “source of revenue”²⁷³ only to be drastically reduced through litigation is absurd. Indeed, case law actually prohibits this result.²⁷⁴ In addition, the legisla-

²⁶⁹ *Id.* at 375.

²⁷⁰ See Joe Stephens, *Panel Advises Ending Tax Breaks for Easements*, WASH. POST, Jan. 28, 2005, at A12.

²⁷¹ Rojas, *supra* note 65, at 414.

²⁷² I.R.C. § 4252(b)(1) (2000).

²⁷³ S. Rep. No. 89-324, at 35 (1965).

²⁷⁴ See *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994); *United States v. Am. Trucking Ass’ns*, 310 U.S. 534 (1940); *Corn Prods. Refining Co. v. Comm’r*, 350 U.S. 46 (1955); *Slodov v. United States*, 436 U.S. 238 (1978).

tive history of the federal excise tax statute demonstrates a clear congressional intent to tax all non-private communications services not explicitly exempted by statute. Finally, Congress has acquiesced to the IRS interpretation of the statute issued in Revenue Ruling 79-404 by reenacting it eleven times.²⁷⁵ Such conduct indicates the intent of Congress to collect on *all* communications services not explicitly exempted by statute regardless of whether the services are distance-sensitive.

For these reasons, it is clear that the district court in *American Bankers Insurance Group*²⁷⁶ was correct in its decision to support the government's position—courts should not award refunds to corporate claimants who assert they have been overtaxed. Appellate courts should take note of the district court decision in *American Bankers Insurance Group*—as it is the only court which has correctly decided this issue.

²⁷⁵ Rev. Rul. 79-404, 1979-2 C.B. 382.

²⁷⁶ *Am. Bankers Ins. Group, Inc. v. United States*, 308 F. Supp. 2d 1360 (S.D. Fla. 2004).

